Central Law Journal.

ST. LOUIS, MO., JUNE 23, 1905.

SOME COMMENTS ON LEGAL TECHNICALITIES.

In the *Globe-Democrat* of the 15th inst. there appeared an editorial in regard to the technicalities of the law, particularly referring to the tendency of courts hitherto to judicially legislate such technicalities of construction as to hamper the legislative acts, which were intended for the general good and cause them to be the means of escape of the very kinds of criminals they were intended to bring to justice. It also referred to the different tone and tendency of recent opinions which were calculated to strengthen the weak points of legislative actsand thereby make them available for the purposes intended.

Our laws are undergoing a change, but there are instances of the hardness of the administration of the law, which justly rouse contempt in common-sense consideration of such administration. Not long since in a United States court a case was brought by a citizen of one state against a citizen of another. The ground for jurisdiction was, of course, the diverse citizenship. The petition or declaration, instead of stating that the plaintiff was on the date of bringing suit a citizen of the state of ————, stated that, on the day the cause of action arose, he was a citizen of the state of ————. The court, as was its duty, examined the declaration and called attention to the faulty statement of the citizenship of the plaintiff, whose attorney took leave to amend at once; whereupon the defendant's attorney announced that he was surprised that the plaintiff was a citizen of the state of ———— and wanted time to investigate, and although a jury was empanneled to hear the case and the plaintiff had come 700 miles and spent several days waiting for the case to be called, the judge threw the case over to the next calendar.

The defendant had pleaded the general issue. The declaration showed conclusively the ground for federal jurisdiction was the diverse citizenship. While it is true that such a fact must be shown as of the day of bringing the suit, yet how manifestly unjust it is to allow the defendant to wait until the day of the trial and contend that he is not prepared upon a question which could have been raised by a demurrer or in the answer to secure a plain issue, if the defendant had the slightest reason to suspect that the plaintiff was guilty of doing that for which he might have been held for perjury, for the plaintiff is bound to testify on oath that he is a citizen of the state he has declared himself to be.

We say to allow a continuance under such circumstances is one of the things which justly brings the administration of law into contempt. The court should have said to the defendant under such circumstances: "The statement of citizenship in this case is full enough to have placed you on your guard, because it is the law of the supreme court, that citizenship once shown to exist is presumed to remain the same till it is proved to be otherwise, and while it is true that citizenship must be shown as of the date of bringing the suit, in the declaration, still you have had ample time to raise that issue and the law ought not to and does not permit a party to wait till some time when a hardship may be inflicted and then take advantage of a point he could have raised before. If the plaintiff asks to amend on the day of the trial you can not complain if it is allowed and the trial proceeded with."

A United States judge, whose memory will be dear to the heart of every American lawyer, as long as there shall be American lawyers, for the manner in which he administered the law in its broadest and most practical sense, was Judge Jerry Black. In a celebrated case he said: "The law is made for practical uses, it listens to no metaphysical subtleties and will not, upon any terms, consent to regard that as right which every sound heart feels to be wrong."

The law, according to Blackstone, is not only made to command what is right, but it is also intended to prohibit what is wrong. Judge Black conceived magnificently of Blackstone when he said: "The law will not upon any terms consent to regard that as right which every sound heart feels to be wrong." In this day of the administration of the law from cases, there is great need for the infusing into the minds of our judges, those qualities which make the names of judges revered and which has found expression in such language as above quoted. The law

should be as pliable in the handsof the courts as wax, and should be made to mould to justice as clearly as that which is reproduced about which wax is moulded.

NOTES OF IMPORTANT DECISIONS.

INTOXICATING LIQUORS—WHEN THE FURNISHING OF INTOXICATING LIQUORS BY A CLUB CONSTITUTES A SALE.—One of the most successful evasions of the law prohibiting the sale of intoxicating liquors is the "social club scheme." One of the cutest devices of this character is recorded in the case of Harper v. State (Miss.) 37 So. Rep. 956. The evidence in this case showed that the appellant operated under the name of the Jonesville Beer Club, and sold tickets to any one who would pay the money for them, who thus became a member of the club as long as the ticket lasted; that one Stewart paid appellant $1, for which he received a ticket which entitled him to eight bottles of beer, upon which four bottles had been delivered, and, as the beer was delivered, appellant would punch the ticket, to show how much had been delivered. The court gave the following instruction for the state, to which appellant excepted: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant was in charge of a club, and kept on hand beer, and furnished Mr. Stewart a ticket for one dollar, and then delivered the beer to said Stewart, and punched his ticket for each bottle of beer delivered to Stewart, then he is guilty, and the jury should so find." The court refused the following instruction asked by defendant, to which he excepted: "The court instructs the jury that if they believe from the evidence that the beer in Harper's charge was on deposit for delivery to Stewart, and that Harper was only acting as the servant of a number of gentlemen in Jonestown who had purchased beer, and had it shipped to them, and was then divided out by giving tickets representing their pro rata shares, then they must acquit."

The Supreme Court of Mississippi, in sustaining the action of the trial court, said: "The ingenious defense so plausibly presented in the brief of counsel for appellant is not supported by the testimony. The proof shows that the witness, Stewart, bought from the appellant eight bottles of beer, paying therefor cash in advance, and receiving as evidence of his purchase a printed ticket or card, representing the amount of beer which the holder was entitled to receive upon presentation of the ticket. The ticket was so arranged that, as each bottle of beer was delivered, a punch hole was made to show that fact. This was a sale, within the meaning of the law. The fact that appellant operated under the style of the Jonesville Beer Club, and that any one could purchase a ticket entitling him to beer upon payment of the money, and remained a member only so long as his ticket lasted, far from being circumstances on which to predicate a theory of innocence, is proof strongly tending to show that appellant was openly and habitually engaged in the illegal sale of liquor."

VESTING OF STOCKHOLDERS' RIGHTS IN TRUSTEES.—Under present economic conditions where vast enterprises are carried on by corporations, stability of corporate management is necessary for success. A consistent policy can hardly be maintained if the board of directors is subject to frequent change by the majority stockholders. The mode of welding diverse interests into a common unit for the support of a continuous policy, is the voting trust. Such trusts have frequently been before the courts in cases where it was unnecessary to pass upon their inherent validity or invalidity. It is settled that if the object is illegal, for example, a secret personal advantage to the members of the pool, the agreement is void. Shepang Voting Trust Cases, 60 Conn. 553. On the other hand, where the object is to protect third parties who, in reliance on the agreement, relinquish claims or advance money to the corporation, the trust is good. Mobile & Ohio R. R. Co. v. Nicholas, 98 Ala. 92; Greene v. Nash, 85 Me. 148. In at least one square decision, however, the voting trust has been held void as contrary to public policy (Harvey v. Linville Improvement Co., 118 N. C. 693), in that the stockholders should exercise their discretion on the questions submitted to them and should not be allowed permanently to divest themselves of the power of control in favor of those who have no beneficial interest in the corporation, and the New Jersey Court of Appeals has recently taken the same view. Warren v. Pim (N. J.), 59 Atl. Rep. 773. There are a number of well-reasoned *dicta* to the contrary. See Brightman v. Bates, 175 Mass. 105; Brown v. Pacific Mail Steamship Co., 5 Blatchf. (U. S.) 525. And upon principle, since many of the stockholders in a large corporation scattered throughout the country have no knowledge of the methods of management and are unable to attend the stockholders' meetings, it is difficult to see why such trusts, if formed *bona fide* for the purpose of promoting the interests of the corporation, ought not to be supported. In practice they are most frequently used for the purpose of assuring to reorganized corporations a trustworthy management.

In reorganizing insolvent corporations a somewhat similar plan is frequently adopted. The readjustment of the disordered finances of such a corporation, especially in a manner to suit all concerned, is a difficult problem. Any arrangement by which a going concern is substituted for the insolvent one, benefits both stockholders and bondholders and should be completed as speedily as possible. Consequently, in order to avoid the delay necessarily incident to a submission of every proposed measure to the shareholders or bondholders, the reorganization committee is

given legal title with practically unlimited discretionary powers in executing the trust. There would seem to be no serious objection to giving them full discretionary power, in working out the plan of reorganization, to change express stipulations as well as to add new ones, where necessary. It should be merely a question of interpretation whether they have been given such a power or not; but the language of some of the cases would deny the possibility of such construction. Industrial & General Trust v. Tod, 180 N. Y. 215. In the only other case where this point seems to have been raised, the court took the same ground. See Cox v. Stokes, 156 N. Y. 491, 507. Yet where the trustees are acting in good faith, there seems to be no greater objection to giving them full power of management in reorganization than in giving them similar power after organization by means of a voting trust. Therefore, in those jurisdictions where the voting trust is held valid, the reorganization agreement giving full power should be upheld also. In each case the stockholder divests himself of the immediate power of control and trusts to the honesty and discretion of others.—*Harvard Law Review.*

EMINENT DOMAIN—DAMAGES FOR SMOKE AND NOISE RESULTING FROM THE CONSTRUCTION OF AN ELEVATED RAILROAD.—The Supreme Court of the United States has decided that a property owner abutting on a street in a city has a right to light and air, which cannot be taken away from him even at the command of the city without compensation. The decision referred to was handed down in the recent case of Muhlker v. New York & Harlem Railroad Company, 25 Sup. Ct. Rep. 522, where the court holds that an owner of real property abutting on a street in New York city, who derived his title from the grantor to the city, in trust for a public highway, of the strip of land constituting the street, and acquired such title when the state courts had decided that one so situated had a contract right to easements of light, air, and access, which could not be taken from him without compensation by the construction of an elevated railroad in the adjoining street, is protected against impairment of his easements of light and air by the substitution by a railroad company, at the subsequent command of the state, as expressed in N. Y. Laws 1892, chap. 339, of an elevated structure in lieu of its surface, or partly depressed roadbed, which occupied the street at the time of his purchase, and cut off his access to the street.

The court shows that the argument of the New York Court of Appeals in the same case reported in 173 N. Y. 549, 66 N. E. Rep. 558, is absolutely contrary to former decisions of that court in the cases of Lewis v. Railroad Co., 162 N. Y. 202, 56 N. E. Rep. 540, Lehr v. Elevated Railroad Co., 104 N. Y. 271, and Story v. Elevated Railroad, 90 N. Y. 122, 43 Am. Rep. 146. These cases as the court in the principal case shows were rightly decided and established a rule of property of property in New York state. They declared unequivocally that an owner of property abutting on a city street had an easement in access, light and air and that the construction of an elevated railroad impaired the value of this easement for which compensation must be made. The New York Court of Appeals attempted to distinguish the principal case from the cases just referred to by reason of the fact that in the principal case the railroad company was compelled by the state to change from a surface to an elevated railroad. In denying the efficacy of a distinction based on such facts, the Supreme Court says:

"The act of the railroad in occupying the viaduct, it is said, was the act of the state. But this defense was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the court of appeals. The court said: 'The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the state to improve the street for the benefit of the public. Instead, it granted to a corporation the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for.' And, further, making distinction between those cases and that at bar, said: 'The state could not if it would — and probably would not if it could—deprive defendant of its right to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway.' And the court concluded that it was the state, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the state, can give no power to invade private rights, even for a public purpose, without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the state. The railroads paid one half of the expense of the change, 'by the command of the statute, and hence under compulsion of law,' to quote from the court of appeals. The public interest, therefore, is made too much of. It is given an excessive, if not a false, quantity. Its use as a justification is open to the objection made at the argument,—it enables the state to do by two acts that which would be illegal if done by one. In other words, as, under the law of New York, the state can authorize a railroad to occupy the surface of a street. It can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story Case that 'the public purpose of a street requires of the soil the surface only.' And this was followed in Forbes v. Rome, W. & O. R. Co., 121 N. Y. 508, 8 L. R. A. 453, 24

N. E. Rep. 919, where a steam railroad was permitted upon a street without liability for consequential damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad Cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation."

A MOST INTERESTING CHANCERY SEQUEL TO A NOTED INSURANCE CASE AT LAW.[1]

The history of the case is stated by the Supreme Court of Nebraska thus:

"The Grand View Building Association obtained a policy of fire insurance upon property belonging to it from the Northern Assurance Company of London, England. The policy contained a clause declaring that it should be void if concurrent insurance should be obtained without the consent of the company in writing indorsed thereon. Concurrent insurance was obtained without such written consent, and on June 1, 1898, the property was totally destroyed by fire. On the 30th of August following, an action was brought on the policy in the district court for Lancaster County, Nebraska. The petition in that action, for the purpose of avoiding the forfeiture, alleged, in substance, that the concurrent insurance was subsisting at the time the policy in suit was written, and was known to exist by the agent of the company who received and retained the premium and wrote and delivered the policy, and who had authority to make the written indorsement mentioned, and that by such conduct he waived for his principal, the making of the writing, and the latter was estopped to insist upon the forfeiture. The company by answer denied the allegations, and at its instance the action was removed to the Circuit Court of the United States for this district, where it was tried, and the jury returned a verdict finding specially the foregoing as well as other issues of fact in favor of the plaintiff. Thereupon the plaintiff recovered a judgment for the face of the policy, interest and costs. The judgment was affirmed upon proceedings in error in the Circuit Court of Appeals for the Eighth Circuit, and the cause was removed thence by *certiorari* to the Supreme Court of the United States. It was decided by the last-named court[2] that the facts pleaded by the plaintiff and found by the jury were insufficient to relieve from the forfeiture, for the reasons, first, because in the absence of fraud or mistake, all contemporaneous or previous oral understandings or agreements are conclusively presumed to have been merged in the written contract, and, second, because the contract itself expressly denied to the agent any power to omit, change, or waive any of its stipulations or conditions by parol, so that the knowledge or intent either of the agent or of the assured, or of both, could not operate as a waiver or as an estoppel, because, if the latter was misled thereby, it was due to his own folly. The very contract that he received notified him that he could safely rely upon nothing less or other than an indorsement upon it. The judgments of both the lower courts were therefore reversed, and in obedience to a mandate from the Supreme Court, the Circuit Court rendered a judgment for the defendant company upon the merits, and for costs. On the 21st day of January, 1903, another action was begun in the district court for Lancaster County, Nebraska. The petition recited identically the circumstances set forth in the pleadings of the plaintiff in the former action, but supplements them by alleging that it was the intention of both the plaintiff and the defendant at the time the policy was written that it should, by its terms, permit the carrying of concurrent insurance, and that its failure so to do was unknown to the plaintiff at the time it was by it received and paid for, and until after the loss by fire, and was due either to the mistake or to the fraud of the agent of the defendant, and that the instrument, as it was executed and now exists, does not express the real and true contract of the parties thereto. The prayer of the petition was that the policy may be reformed so as to include the alleged omitted

[1] Grand View Building Assn. v. Northern Assur. Co., 102 N. W. Rep. 246.

[2] Northern Assur. Co. v. Ass'n., 183 U. S. 308, 22 Sup. Ct. Rep. 133, 46 L. Ed. 213.

permission, and that when so reformed the plaintiff might recover thereon. Issues were joined and after a trial findings were made and a judgment rendered according to the averments and prayer of the petition, and the defendant prosecuted an appeal."

The state court affirmed the judgment of the lower court holding that the limitation of the time for bringing suit stipulated in the policy (presumably of one year from the time of the fire) is void under the statutes of limitation of the state; that the judgment of the Supreme Court of the United States in the law case was not *res judicata* in the equity suit and that the evidence was sufficient to show a mutual mistake in the agent's failing to indorse on the policy a permit for other insurance.

The reason for the failure of the insurance company to remove the equity cause to the federal court can only be surmised. Certainly it had the right so to remove the case and its failure to do so is incomprehensible on any other theory than that the first removal and consequent decision led the legislature of the state to enact a law barring foreign insurance companies from the right to transact business in the state in case of their removal to the federal court of an action instituted therein.

One can not read the opinion of the state court without being impressed with the defiant attitude assumed toward the national tribunal. The opinion fairly bristles with defiance from beginning to end. What the outcome of this unpleasantness will be remains to be seen. Apparently no federal question is involved and the only hope of the insurance company to get the United States Supreme Court to take cognizance of the case is the attack on the binding force of its decision. In discussing the question of *res judicata* and prodding the national tribunal, the Nebraska court says:

"Is the judgment of the federal court *res judicata*, and an estoppel to the prosecution of this suit? We think that, so far as this jurisdiction is concerned, whatever may be the law elsewhere, this court has conclusively answered this question in the negative. When the plaintiff began the former action, it supposed, as is shown by testimony of its counsel preserved in the record, and, moreover, was bound to suppose, not only that an action at law on the contract, with pleading and proof of oral waiver of the stipulation for forfeiture, was a proper and adequate remedy for the recovery of its loss, but that, because it was so, a suit in equity to obtain a vain and unnecessary reformation of the contract would not lie. Insurance Co. v. Norwood, 69 Fed. Rep. 71, 16 C. C. A. 136; Home Fire Insurance Company v. Wood, Neb. 386, 69 N. W. Rep. 941.

"The plaintiff began its action and prosecuted it to final judgment in reliance upon, and in strict conformity with, these decisions, the former of which was justified, as the court pronouncing it thought, by the opinion of the Supreme Court of the United States in Insurance Company v. Wilkinson, 13 Wall. 233, 20 L. Ed. 617. To say now that the plaintiff is estopped because it failed in the first instance to take its cause into a forum whose doors were, to all appearances, firmly and finally bolted and barred against it, would not fall short of a mockery of justice. The language of this court in State v. Bank of Commerce, 61 Neb. 22, 84 N. W. Rep. 406, is strictly applicable to the present situation: 'One is not precluded from a remedy which the law gives him because he has attempted to avail himself of one to which he is not entitled.' More especially must this be true if the remedy to which he first makes unavailing resort is one which has been expressly and exclusively sanctioned by the very tribunals to which he makes application for it. The same doctrine was reannounced by this court in Bigley v. Chicago, B. & Q. R. Co. (Neb), 95 N. W. Rep. 345, approving and adopting the language of the Supreme Court of Indiana in Bunch v. Grave (Ind. Sup.), 12 N. E. Rep. 514: 'A party who imagines he has two or more remedies but who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one. * * * Justice ought not to be wholly denied because she mistook her remedy in the first place.' Nor, it may well be added, because the first and only really prejudicial and misleading error, if it was an error, which we much doubt, was not made by the litigant, but by the ministers of justice themselves. To the same effect are Pekin Plow Co. v. Wilson (Neb.), 92 N. W. Rep. 178; Omaha v. Redick, 61 Neb. 163, 85 N. W. Rep. 46; Simmons v. Fagan, 62 Neb. 287, 87 N. W. Rep. 21;

Lansing v. Assurance Co. (Neb.), 93 N. W. Rep. 756.

"The former suit was not inconsistent with this, but in that case the plaintiff sought to treat the contract as having been, in effect, reformed by the circumstances of its execution, which, it was claimed, waived or annulled one of its covenants. The supreme court held—and in practical effect it held nothing more—that the supposed reformation had not been accomplished. Thereupon the plaintiff resorted to this suit to secure its accomplishment, and for his right so to do he may quote no less authority than Mr. Chief Justice Marshall, who, in Parker v. Judges, 12 Wheat. 561, 6 L. Ed. 729, says that one who proposes to 'try a question entirely new, which has not been and could not be litigated at law, may do so before the commencement of a suit at law, pending such suit, or after its decision by the highest judicial tribunal.'

"From the final decision in the former action, four out of the nine judges of the United States Supreme Court dissented. The opinion of the majority, being an adherence to the letter of an antiquated and worn-out technical formality, seems to us to be an ironical comt mentary upon the often-repeated judicial boast that the law is a progressive science, and that the courts are continually adapting their processes and proceedings to changing social and business needs and customs. Either so, or else, as we consider, the court fell into a still more grievous error. The familiar maxim that equity regards that as having been done which was agreed to be and ought in good conscience to have been done has not for a long time been a stranger in courts of law in cases in which equitable matters are properly in issue. It is admitted on all hands that the agent, Borgelt had authority to bind his principal by executing the desired written stipulation for concurrent insurance. The greater includes the less. If he had power to enter into the covenant, he also had power to agree to enter into it. And if, for value, he made such an agreement, and, through fraud or mistake, failed to keep it, his failure is actionable both at law and in equity. It is upon such failure that this action is grounded. The parties did not waive written consent to concurrent insurance, or attempt so to do, but, on the contrary, agreed that it should be given. It is because of such agreement, and because such consent was mistakenly or accidentally omitted, that the plaintiff is entitled to have the contract reformed. Besides, the place where the contract was made, and where by its terms it was to be performed, and where the subject of it was situated, is in Nebraska. We are at a loss to understand why the laws of Nebraska, as expounded by the highest court of the state, are not conclusive of its obligatory force, and of its meaning and effect, if not of the remedy appropriate to its enforcement. It is another familiar and often quoted maxim that the law enters into and becomes an inseparable part of every contract. We desire to be told what law, other than of Nebraska, became thus incorporated into the contract in suit."

On the question of the sufficiency of the evidence to support a reformation of the policy and a judgment for plaintiff thereon as reformed, the Nebraska court says:

"No motive is shown for actual fraudulent intent on the part of the agent of the insurance company, and it is not attempted to be proved that he was guilty of any, or of any intentional deceit or concealment from which constructive fraud may be inferred. Mistake, to be actionable for the reformation of a contract in a court of equity, must be mutual, and not due to the gross negligence of the complaining party. These propositions are elementary, and are so familiar to the profession that the citation of authority in their support is not deemed necessary. We have made a careful examination of the evidence, and the interpretation that we put upon it is the following: There were but three participants in the transaction—Walsh, the president and agent of the association; Borgelt, an agent of the insurance company; and Richards, an agent of another insurance company, who acted to some extent as an intermediary between the other two. Richards testified that he was the first to tell Borgelt that Walsh desired the latter to write $2,500 insurance on the property in question, and that he at the same time told him that there was already $1,500 insurance upon it, with which it was desired that the new policy should be concurrent. Borgelt denied this latter statement, and denied that he knew of the existing insurance. Walsh testified that he was present at an interview between the other two in which the subject of concurrent insurance was mentioned and dis-

cussed, but he did not attempt to give the conversation, or the purport of it, in detail. As to what occurred after the instrument had been written, and when it was delivered, he testified upon cross-examination as follows: 'Question. In the taking of the policy [and] in payment of your premium, what or whom did you rely upon as to the form of the policy in which the risk was underwritten? Answer. I relied— I never looked at the policy. I supposed it was like all my policies. I presumed the indorsement was on there, and I did not know for two or three weeks after the fire but that the policy was all right.' This is, in substance, the whole case. It is not pretended that there was any specific agreement that the now desired endorsement should be made upon the policy. The whole impression that this evidence makes upon our minds is this: That Walsh desired to obtain from the defendant insurance concurrent with that then existing. That Borgelt, the agent, knew of the existing insurance, and knew of the desire of Walsh, and intended to comply with it, but, through inadvertence, omitted so to do. That he knew of the condition for a forfeiture contained in the policy, and knew that it could be avoided only by an indorsement on the instrument. That the failure to make the indorsement was due, not to fraud, but to the mistake or inadvertence of the agent, and that the acceptance of the contract by Walsh without the indorsement was due also to his mistake or inadvertence. The evidence falls short of showing that he knew that such an indorsement was necessary. He seems to have had a desire for concurrent insurance, and to have made it known to Borgelt; but what form of contract or policy was requisite for that purpose, he does not testify, nor is it otherwise shown that he knew. That matter he seems to have left to the skill and fidelity of the agent. That he was somewhat negligent in so doing, and in accepting and retaining the policy without reading it, is evident; but his negligence in that regard was not greater than that of the agent, with which it was concurrent, nor we think greater than that of ordinary capable and prudent men in the transaction of such affairs. The case, we think, falls within the rule laid down in Pomeroy's Equity Jurisprudence (2d Ed.) vol. 2, par. 845, and in the cases cited in his note. We quote the paragraph in full:

'The first instance which I shall mention is closely connected with the doctrine stated in the last paragraph but one. It was there shown that, if an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form, the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made, but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases, but the rule is not confined to these instances.'

"Within the rule thus established, we think that the evidence supports the findings of fact of the trial judge, and that the mistakes of the agent and of Walsh were concurrent and mutual, and of a character against which equity will in ordinary cases relieve.

* * * * * *

"Without the written policy, there would have been no contract between the parties at all, however much they might have conferred with the reference to the terms of one if made; but the instrument, when written and accepted, was obligatory upon both, and the plaintiff can recover only for a breach of it. The aid of equity is required merely to enable him to show that he is not, in good conscience, to be held, as he is charged with being, guilty of committing the first breach of it, and to establish that a certain stipulation, which ought to have been, and which

the parties intended should be included in it, was mistakenly omitted. When equity has made the desired correction, according to the pleading and proof, it proceeds to enforce not only the newly incorporated covenant, but the formal written contract as amended. Indeed, it could not do otherwise, because the omitted stipulation, standing alone, would be meaningless. This view, we think, is in harmony with previous decisions both in this court and elsewhere. Gwyer v. Spaulding, 33 Neb. 580, 50 N. W. Rep. 681; Baldwin v. Burt, 43 Neb. 256, 61 N. W. Rep. 601; Hyde v. Insurance Co. (Neb.), 97 N. W. Rep. 629; Winchell v. Coney (C. C.), 27 Fed. Rep. 482; Dodge v. Insurance Co., 12 Gray, 71; Wood on Limitations (3d. Ed.), § 58, p. 137."

The paramount question with the legal profession and policy holders in general is whether the Nebraska case or the federal supreme court case is the precedent? When the federal supreme court announced its decision it sent a chill through the holders of fire insurance policies. This new phase of the case makes hope return. The Nebraska court is not alone in condemning the decision of the federal supreme court.

In German-American Insurance Co. v. Yellow Poplar Lumber, Co.,[3] the Kentucky court of appeals says: "Appellant relies very strenuously upon an opinion of the Supreme Court of the United States—the case of Northern Insurance Co. v. Grand View, etc., Assn., 183 U. S. 108, 22 Sup. Ct. Rep. 133, 46 L. Ed. 213. Deference and great respect is always due this exalted tribunal, but in this case it should be borne in mind that the supreme court was not construing a provision of the constitution of the United States, an act of congress, a treaty, or giving an exposition of law upon which its judgment would be final and conclusive here and elsewhere. The court was dealing with a question of general jurisdiction, upon which it was privileged, as this court is privileged, to exercise an independent judgment. It is no new thing for this court and the honorable supreme court to be in disagreement upon questions of general law. To review the long line of authorities in Kentucky, and bring them in accord with the conclusion reached by the Supreme Court of the United States in the case quoted above, would be to confess previous inability of this court to make and declare the law governing the rights and responsibilities of insurance companies and their patrons in this state. This would amount to an abdication of duty by the supreme judicialpower of this state." It has also been condemned by the Supreme Court of Appeals of West Virginia in Medley v. German Alliance Insurance Co.,[4] and by other state courts in equally strong language.

Under the New York standard form of fire insurance policy in very general use, there are dozens of forfeiture clauses on a par with the "other insurance clause." With the tendency of the insured to rely on the agent and the good reputation of the insurance companies represented by such agent without looking at the policies when delivered, the Nebraska decision is a boon indeed to the policy holder.

ROBERT J. BRENNEN.

St. Paul, Minn.

[3] 84 S. W. Rep. 551.

[4] 47 S. E. Rep. 101.

CARRIERS — CONNECTING CARRIERS — LIABILITY OF INITIAL CARRIER.

ECKLES v. MISSOURI PAC. RY. CO.

St. Louis Court of Appeals. Missouri, April 18, 1905.

Where a carrier is paid full freight for carriage to a destination beyond the termination of the carrier's line, the contract is to carry the goods through to their destination, and the first carrier is responsible for the delivery of the goods.

The material averments of the petition on which the case was tried are as follows: Defendant owned and operated a railroad running from South Omaha, Neb., to Pueblo, Colo., where it connects with other lines of railroad running from said point to the city of Los Angeles, Cal. Defendant is a common carrier of goods from South Omaha to Pueblo, and, by itself and over roads connecting with it at Pueblo, on to Los Angeles. On the 14th day of November, 1890, plaintiffs purchased of Swift & Co. 1,756 pieces of meat, known to the trade as "sweet pickled bellies," at $1,200, and requested Swift & Co. to ship the meat to Los Angeles, and pay the freight thereon. Swift & Co., in pursuance of said instructions, made a contract in writing (filed with the petition) by which defendant agreed to transport the goods to Los Angeles for $350, which was then and there paid to the defendant. The defendant agreed to transport the goods over its own road to Pueblo, from Pueblo to Trinidad over the Denver & Rio Grande Railroad, and from Trinidad over the Atchison,

Topeka & Santa Fe Railroad to Los Angeles. The goods were loaded into a refrigerator car in good condition; the car iced and delivered to defendant, at South Omaha, on the 14th day of November, 1890; and on the 15th day of November, 1890, Swift & Co. drew a draft on plaintiffs for the price of the goods, plus the freight, amounting in all to $1,555, which plaintiffs paid. The goods reached Pueblo over defendant's road on the 17th day of November, 1890, and reached Trinidad on the 18th of November; but the defendant wholly failed and refused to transport the goods further than Trinidad, or to deliver or cause them to be delivered to the Atchison, Topeka & Santa Fe Railroad Company, or any other carrier at that point, for transportation, and for a period of 14 days failed to forward the goods from Trinidad to Los Angeles. After a lapse of 14 days defendant caused the goods to be transported by a connecting carrier other than the Atchison, Topeka & Santa Fe Railroad, and they reached Los Angeles on the 15th day of December, 1890. During the 14 days' delay in forwarding the goods from Trinidad, defendant neglected to ice the car in which the goods were shipped, and when they arrived at Los Angeles the meat was spoiled, soured and tainted, and was sold for soap grease for the sum of $86.

The answer admitted the receipt of the meat from Swift & Co., and the making of the contract in writing with said company, which was filed with the petition as an exhibit, but denied that the contract imposed upon defendant the duty of transporting the meat beyond Pueblo, the western terminus of its line, or of forwarding it by way of other lines of railway to its destination, and alleged the performance of its duty under the contract by transporting the goods to Pueblo in good condition and on time, and by delivering them to the Denver & Rio Grande Railroad, a connecting carrier.

The evidence shows that the shipment was solicited by Daniel King, contracting agent for the Missouri Pacific Railroad Company, and that he furnished the routing. The evidence also tends to show that the car in which the meat was shipped arrived at Pueblo in good order and on time, and that the meat was then in good condition; that it was promptly delivered to the Denver & Rio Grande Railroad, by which it was hauled to Trinidad and placed on a connecting line between the Denver & Rio Grande and the Atchison, Topeka & Santa Fe Railroad Companies on November 19th, and by the latter road taken into its yards, a transfer sheet delivered to its agent without objection, and $200 tendered to pay the freight, which tender was refused on the claim that the road was entitled to the same rate as from Missouri River points. The evidence further tends to show that there was no traffic arrangement between the Missouri Pacific Railroad Company and the Atchison, Topeka & Santa Fe Railroad Company to receive trans-continental freight at Trinidad for less than the local rate ($1.30 per 100 pounds), but there was a traffic arrangement between the two roads that trans-continental freight received by the Missouri Pacific should be delivered to the Atchison, Topeka & Santa Fe at Kansas City; the through rate from Kansas City to Los Angeles being $1.75 per 100 pounds. On learning that the Atchison, Topeka & Santa Fe Railroad would not haul the goods from Trinidad for $200, the Denver & Rio Grande Railroad Company hauled the car back to Pueblo, and from there re-routed it over connecting lines to Los Angeles, where it arrived on December 15, 1890. The car was immediately opened on its arrival, and the meat found to be sour and tainted, and, being unfit for any other purpose, was sold for soap grease, for the sum of $85. The car was not re-iced at Pueblo, but was found well iced when it arrived at Los Angeles. When or by what road it was re-iced does not appear from the evidence.

BLAND, P. J.—(after stating the facts.) The evidence shows that defendant's agent solicited the shipment of the goods from Swift & Co.. named the routing and the through rate, and furnished Swift & Co.'s agent with a blank printed form of contract, which was filled out in ink by the agent and presented to the defendant's agent at South Omaha, who signed it for the railroad company. We think this evidence is conclusive that both parties agreed to the contract, although it was not signed by the plaintiffs, or by Swift & Co. as their agent.

The shipment was made wholly without this state, and for this reason the statutes of the state do not control. The statutes of Nebraska (the state in which the contract was made) were not offered in evidence, and, as there is no presumption that the statutes of one state exist in another, the rule of the common law must control in the interpretation of the contract, and the defendant's liability thereunder. Morrissey v. Ferry Co., 47 Mo. 521.

In Crouch v. Railway, 42 Mo. App., *loc. cit.* 249, Thompson J.. said: "By the principles of the common law, as established in this state, a common carrier who receives goods for transportation to a point beyond his own line engages only to carry them safely and within a reasonable time to the end of his own line, and deliver them to the next connecting carrier to continue or complete the transit, unless the usage of the business or of the carrier, or his conduct or language, shows that he takes the parcel as carrier for the whole route. Coates v. United States Express Co., 45 Mo. 238; McCarthy v. Railroad, 12 Mo. App. 159, 166; Goldsmith v. Railroad, 12 Mo. App. 479, 483. Nor does the fact that the carrier so receiving the goods gives a through rate of freight take the case out of this rule, but he is still deemed to have received them in the character of carrier for his own route, and of forwarding agent for the shipper for the remaining route. McCarthy v. Railroad, *supra*; Goldsmith v. Railroad, *supra*."

There are many authorities, including some Missouri cases, which hold that payment of full freight for carriage between two points is a contract to carry between those two points, and that the first carrier is responsible for the delivery of the goods. Davis v. Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. Rep. 965; Lin v. Railroad, 10 Mo. App. 125; Fischer v. Transportation Co., 13 Mo. App. 143; Baltimore & P. Steamboat Co. v. Brown, 54 Pa. 77; Jennings v. Railway, 127 N. Y. 438, 28 N. E. Rep. 394; Atlanta & West Point R. Co. v. Texas Grate Co., 81 Ga. 702, 9 S. E. Rep. 600; Falvey v. Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58; Hill Mfg. Co. v. Railroad, 104 Mass. 122, 6 Am. Rep. 202; Adams Express Co. v. Wilson, 81 Ill. 339; Perkins v. Railroad, 47 Me. 573, 74 Am. Dec. 507. On the other hand, there are many respectable decisions, especially by the federal courts, holding that prepayment of the through rate of freight does not oblige the initial carrier to do more than safely and within a reasonable time deliver the goods to its connecting carrier. But we think the doctrine of the cases last above cited is more consonant with reason and fairer to the shipper. And we do not understand defendant's contention to be that the shipment was not a through one, but, as the goods had to be transported over several lines of railroad to reach their destination(a fact known to the shipper), it was competent for the defendant, by contract, to protect itself against liability for loss not occurring on its own line. That it might protect itself against liability not occurring on its own line, we think, is well settled by the following authorties: Read v. Railroad, 60 Mo. 199; Nines v. Railway, 107 Mo. 475, 18 S. W. Rep. 26; Kechum v. Express Co., 52 Mo. 390; Snider v. Express Co., 63 Mo. 376; Railroad v. Myrick, 107 U. S. 102, 27 L. Ed. 325; Mulligan v. Railway, 36 Iowa, 186, 14 Am. Rep. 514; Detroit & Milwaukee Railroad Company v. Bank, 20 Wis. 122; Pendergast v. Express Co., 101 Mass. 120; Berg v. Railroad, 30 Kan. 561, 2 Pac. Rep. 639; St. L. & I. Mt. R. Co. v. Larned, 103 Ill. 293; Keller v. Railroad (Pa.), 46 Atl. Rep. 261; Harris v. Howe, Receiver, 74 Tex. 534, 12 S. W. Rep. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862.

The contract of shipment expressly provides: "This contract is accomplished and the liability of the Companies as Common Carriers thereunder, terminates on the arrival of the goods or property at the station or depot of delivery." And if there was nothing in the waybill itself and no evidence to qualify the exemption clause, we would, without hesitation, hold that the defendant's liability ceased when, without unreasonable delay, it delivered the car to the Denver & Rio Grande Railroad Company. But the evidence shows that the defendant selected the particular lines of railroad over which the car should be transported to its destination, and had these lines of road specially designated on the waybill, and collected and receipted for a through freight charge. The evidence also tends to show that the defendant had a traffic arragement with the Atchison, Topeka & Santa Fe Railroad Company for the transportation of transcontinental freight, whereby a through rate was agreed upon, which was to be shared in common by them. We think the reasonable inference to be drawn from this evidence is that the defendant made the Denver & Rio Grande and the Atchison, Topeka & Santa Fe Railroad Companies its agents for the transportation of the car of meat to Los Angeles, and that the exemption clause was inserted in the waybill for the purpose of fixing liability as between the several lines over which the car would have to be hauled to reach its destination, and does not have the effect to restrict defendant's liability to the shipper for losses which might occur on its own line. We so construed the contract on the former appeal(72 Mo. App. 296) and think this construction is supported by the case of Harp v. Grand Era, 1 Woods, 184, Fed. Cas. No. 6, 084, where it was held: "Where several carriers unite to complete a line of transportation and receive goods for one freight, and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received." A similar ruling was made in Baltimore & Ohio R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26, in Barter v. Wheeler, 49 N. H. 25, 6 Am. Rep. 434, and in Wyman v. Railroad, 4 Mo. App., *loc cit.* 39, where it is said: "It may be regarded as equally well settled, upon authority, that if several common carriers, having each its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum, and which the carriers divide among them, then, as to third parties with whom they contract, they are liable jointly for a loss taking place on any part of the whole line. Barter v. Wheeler, 49 N. H. 25 [6 Am. Rep. 434]; Bradford v. Railroad, 7 Rich. Law, 201 [62 Am. Dec. 411]; Cincinnati, etc., R. Co. v. Spratt, 2 Duv. 4; Nashua Lock Co. v. Railroad Co., 48 N. H. 339 [2 Am. Rep. 242]; Quimby v. Vanderbilt, 17 N. Y. 306 [72 Am. Dec. 469]; Chouteaux v. Leech, 18 Pa. 224 [57 Am. Dec. 602]; Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. 77; Hart v. Railroad, 8 N. Y. 37 [59 Am. Dec. 447]. Also to the same effect is the case of Cummins v. Railway, 9 Am. & Eng. R. Cas. 36, where it was ruled: "Railroad companies have the power to contract to carry goods beyond their own line, and where they enter into such contract they will be liable as a common carrier throughout the whole transit. Three railroad companies, whose lines formed a continuous road between X and Y, held themselves out to the public as having formed a combination for the transportation of goods on the entire route. A at X shipped goods with one of the companies addressed to B at Y, and took a receipt whereby the company undertook to forward as per directions.

Said receipt contained numerous provisions limiting liability, and provided that all the carriers transporting the property as a part of the through line should be entitled to all the exceptions and conditions therein mentioned. Held, that said carrier had contracted to carry the goods through to Y, and was liable for a loss occurring in consequence of delay in said transit, although the same occurred beyond its own line." It is true, there is no direct evidence to show that the Denver & Rio Grande Railroad Company was a party to the traffic arrangement shown to exist between the defendant and the Atchison, Topeka & Santa Fe Railroad Company; but we think, from its selection as one of the connecting carriers, and from the evidence and circumstances shown in the case, it may reasonably be inferred that it was either a party to the arrangement, or was selected by defendant company as its agent to forward the car to the Atchison, Topeka & Santa Fe Railroad Company. When such connection or agency is shown, Hutchison says: "It is universally agreed that, if any connection of that character exists by which they become participants in common in the profits of the business, any one or all of them may be held liable at the option of the loser." Hutchison on Carriers, § 158.

The routing of the car was diverted without the consent or knowledge of the shipper, and the evidence shows that this change of route caused the delay and the damage to the goods. The agreement was specific that the car should be transported over the roads designated on the bill of lading. This agreement was not satisfied by a change in the routing, and was a clear breach of the contract. Hutchison on Carriers, § 310; Goodrich v. Thompson, 44 N. Y. 324. And the defendant is liable notwithstanding the exemption clause in the bill of lading. G. H. & H. Ry. Co. Allison, 59 Tex. 193; Texas & P. Ry. Co. v. Boggs (Tex. Civ. App.), 40 S. W. Rep. 20; Stewart v. Transportation Co., 47 Iowa, 229, 29 Am. Rep. 476; Illinois C. R. Co. v. Southern Seating & Cabinet Co., 104 Tenn. 568, 58 S. W. Rep. 303, 50 L. R. A. 729, 78 Am. St. Rep. 939.

We think the court properly refused defendant's declarations of law, and that the evidence supports the judgment. The judgment is therefore affirmed. All concur.

NOTE.—*Liability of Initial Carrier of Goods for Forwarding Goods by Another Route than that Designated.*—It is a general rule that when a railroad company receives goods to be transported to a point not on its line, with directions of the shipper to forward them by a certain connecting line, such company is liable for injury to the goods resulting from its negligence in failing to deliver them to the carrier indicated. Congar v. Railroad, 17 Wis. 477; Johnson v. Railroad, 39 How. Prac. (N. Y.) 127; Brown & Haywood Co. v. Railroad, 63 Minn. 546, 65 N. W. Rep. 961. Or, to state the rule a little more differently, when goods are delivered to the first of a connecting line of railroads, to be shipped by a specified route, a delivery to another railroad, which forms a part of a different route, is a conversion which renders the first road liable for the value of the goods. If they be delayed by such delivery, or damage results, the first road may be held responsible therefor. See Georgia Railroad Co. v. Cole, 68 Ga. 623.

The application of a rule of law, however, being more important from a practical standpoint at least than the more general statement involved, we shall improve the opportunity here offered to show how the courts have applied the rule we have stated in the first paragraph of this annotation. We call attention first to the comparatively recent case of Brown & Haywood Co. v. Pennsylvania Railroad, 63 Minn. 546, 65 N. W. Rep. 961. In that case it appeared that a carrier received goods to be carried to a point beyond its own line, with directions to deliver them to certain connecting carriers, with the last of which the shipper had made an agreement for stopping the car at intermediate points on its line for delivery of portions of the goods. It, however, wrongfully sent the goods by different connecting carriers, whose lines reached but one of the intermediate points. On arrival of the goods there, the shipper disclosed his contract to have them distributed at the three points, and demanded compliance therewith. The carrier refused compliance until payment of freight for the whole route, when it delivered the goods destined to that point, and undertook, at its own cost, to carry to each of the other points the portion of the goods to be delivered there, and, in doing so the goods were injured. The court held that the initial carrier, though it did not know of the shipper's agreement with the last connecting carrier, to which it was directed to deliver the goods, was liable for the damage. So also in the case of Ingalls v. Brooks, 1 Edm. Sel. Cas. (N. Y.) 104, it appeared that manufacturers at North Adams, Massachusetts, consigned goods to a certain firm in Baltimore, Md., the cases being marked "Railroad Line." At New York, the carrier, instead of forwarding the goods by rail, and desiring to increase its profits on the shipment, forwarded the goods by a boat bound for Baltimore, which was lost at sea. The court held that the words "Railroad Line" plainly indicated an intention on the part of the shippers that the goods should be forwarded by rail, so far as such a mode of transportation was practicable between North Adams and Baltimore, and that therefore the initial carrier and forwarder was liable for the loss of the goods, even though it was customary and usual to forward goods by boat from New York to Baltimore. A case almost identical in its facts with the case just referred to, but in which the question of proximate cause was also raised, is that of Philadelphia, etc., R. R. v. Beck, 125 Pa. St. 620, 17 Atl. Rep. 505, 11 Am. St. Rep. 924. In that case the court held that where a plaintiff ships over defendant's road goods marked "Via P. care of A. Coast Line, by fast freight," and defendant delivers the goods at P. to a steamship company, in whose possession they are destroyed by fire, the question of proximate cause does not enter into the question of defendant's liability, as it was liable for breach of contract in not sending the goods by fast freight. Another case similar in facts to the last two cases cited where the initial carrier, greedy of profits, takes advantage of a water route in forwarding goods consigned to it, and is held liable for the loss of the goods on water, is that of Wilcox v. Parmelee, 5 N. Y. Super. Ct. (3 Sandf.) 610. In that case it appeared that A contracted with B to forward certain goods from New York to Ohio "by

steam." A shipped the goods by rail to a point on Lake Erie and then forwarded them the rest of the way by sailing vessel on Lake Erie, where they were lost. The court held that A was liable for the loss.

It is well settled in this connection that the refusal of the connecting carrier designated by the shipper to receive the goods does not relieve the carrier from liability from loss occurring on a different carrier selected by him. Thus, in the case of Johnson v. New York Central R. R., 39 How. Prac. (N. Y.) 127, the plaintiff testified that he instructed the carrier's agent to ship over a particular connecting like, and no other. The agent of the railroad testified that the connecting carrier selected by the consignor refused to receive the goods and that under the usages of trade a carrier had the right, in case of such refusal, to forward the goods by some other route. The court, however, denied the existence of such a right where the consignor designates the connecting carrier. To same effect is Southard v. Minneapolis, etc., R. R., 60 Minn. 382, 62 N. W. Rep. 442. In that case a traffic association issued a through bill of lading for flour from Minneapolis to Boston, containing a stipulation that in case of loss, detriment or damage, the carrier alone should be liable in whose actual custody it should be at the time of the loss. The court held that the shipper was entitled to an uninterrupted and continuous transportation from Minneapolis to Boston, and that the carrier who had transported the freight to a point where another was to assume custody and control became a guarantor or surety that the latter would receive it, and was liable as an actual custodian, where the connecting carrier unreasonably neglected or refused to receive it.

Two cases which seem to withhold assent to the general rule, as the authorities which we have cited seem to sustain, are Regan v. Grand Trunk Railway, 61 N. H. 579, and Galveston, etc., R. R. v. Short (Tex. Civ. App.), 25 S. W. Rep. 142. In the first case cited it appeared that an intermediate carrier, on ascertaining that the goods, after reaching the terminus of its line, could not be forwarded by the stipulated route, promptly forwarded them by another route, but neglected to notify the shipper of the change of route. This want of notice, however, would not have avoided the loss of the goods which followed. The court held that the shipper had no right of action against the carrier. In the case of Galveston, etc., R. R. v. Short, *supra*, the court held that a carrier which makes a through shipment under a special contract for a reduced rate of freight is not liable for an injury to the shipment on a certain connecting line, though it did not choose the through route which the shipper preferred.

The simple proposition in this line of cases is to recognize the failure of the company to ship by any other route than that designated as a breach of the contract rather than as a tort. In such case the question of proximate cause is not involved. The simple questions are: (1) Did the defendant stipulate to forward goods consigned to it by a certain route? (2) Did the defendant forward the goods by a route different than that mentioned in the contract? If it did it has violated its contract and is liable for the loss resulting.

JETSAM AND FLOTSAM.

THE EFFECT OF A MOTION BY EACH PARTY FOR A DIRECT VERDICT.

An interesting example of judicial legislation long ago arose in New York and has been perpetuated by the courts of that state. This was the holding that when each party to an action made a motion upon the trial that the court direct a verdict in his favor, such proceeding was in effect a consent to submit to the court all questions of law and fact, and was a waiver of the right to have the questions of fact go to the jury. And since, under this rule, the parties were deemed to clothe the court with the functions of a jury, a direct verdict stood as would the finding of a jury without any direction, and therefore the review of the case was governed by the same rules that applied in cases of ordinary verdicts, all controverted facts and all facts inferable in support of the judgment being deemed conclusively established in favor of the party for whom the verdict was directed. Koehler v. Adler (1879), 78 N. Y. 290; Thompson v. Simpson (1891), 128 N. Y. 283; Trustees v. Vail (1897), 151 N. Y. 468; Porter v. Insurance Co. (1900), 164 N. Y. 504; Northam v. Insurance Co. (1901), 165 N. Y. 666; Sigua Iron Co. v. Brown (1902), 171 N. Y. 488; Leggat v. Leggat (1903), 79 App. Div. 141.

Several similar cases arose in the United States courts sitting in New York, and the same rule was followed. Chrystie v. Foster (1894), 9 C. C. A. 606; Merwin v. Magone (1895), 17 C. C. A. 361. And one of them went to the Supreme Court of the United States, where the rule was affirmed without any question or serious discussion. Beuttell v. Magone (1894), 157 U. S. 157. But the rule seems to be established in the federal courts generally, and not limited to cases tried in New York, for it was recently adopted on the authority of the Beuttell case by the circuit court of appeals for the fifth circuit, sitting in Alabama, in Bradley Timber Co. v. White (1903), 58 C. C. A. 55.

Two other jurisdictions have adopted it,—Ohio, in 1901, in the case of Bank v. Hayes & Sons, 64 Ohio St. 102, on the authority of the Thompson case in New York and the Beuttell case, and North Dakota, in 1897, in the case of Mortgage Security Co. v. Elevator Co., 6 N. Dak. 408, on the authority of nothing in particular. The rule was reaffirmed in First M. E. Church v. Fadden (1898), 8 N. Dak. 162, and Bank v. Town of Norton (N. Dak. 1903), 97 N. W. Rep. 860.

But a recent case in Minnesota has refused to recognize the rule. This is Strauff v. Bingenheimer (1905, Minn.), 102 N. W. Rep. 694. The court, by Chief Justice Start, says: "A motion or a request for a directed verdict presents under our practice a question of law only. Such a motion or request is frequently made by counsel at the close of the evidence for the purpose of securing a ruling of the trial court upon some special question of law which is deemed to be decisive of the case, or for otherwise conserving the rights of his client. Now, to hold that when a party makes such a motion the opposite party, by making a counter motion for a directed verdict, may deprive him of the right to a jury trial in case the court should differ with him as to the law, would in practice result in great injustice. It would be a strained and unjust construction to hold in such a case that the party first making the motion thereby admitted that, if his own motion be denied, the motion of his adversary should be granted, or that he waived a jury trial, and consented that the trial judge might decide the case in accordance with the preponderence of the evidence. It cannot fairly be assumed, from the mere fact that a party makes a motion or request for a directed verdict in his favor, that he concedes anything except for the purposes of the motion. * * * We therefore hold that a motion

by each party to an action that a verdict be directed in his favor cannot be construed as a waiver of the right to have the facts passed upon by the jury, or an agreement to submit them to the trial judge in case the motion be denied."

This view seems more reasonable and more in accord with the general theory of motions for directed verdicts. The ordinary rule is that, when the evidence so conclusively entitles a party to a verdict that a verdict for his opponent would have to be set aside, the court may properly direct a verdict in his favor. Gentry v. Singleton (1904), 63 C. C. A. 231; Boston & Maine R. R. Co. v. Sargent (1904), 72 N. H. 455. And the motion thus presents only the naked legal question whether or not there is any evidence tending to prove the cause of action or defense, but does not involve the question as to the weight of the evidence. Illinois Cent. R. R. Co. v. Smith (1903), 111 Ill. App. 177. Such being the case where only one party makes the motion, it is hard to see how its scope and purpose can be wholly changed by the mere fact that the other party has made the same motion. If each party severally wishes merely to test the legal sufficiency of the evidence, why should the result of both efforts be to shift upon the court the wholly foreign question of the weight of the evidence? As was suggested by the Supreme Court of Wisconsin, "It is certainly a strained construction to hold that an assertion that there is no evidence against one is that there is none in his favor; yet that is the result of the New York doctrine that a motion to direct a verdict is an admission that there is no question of fact for the jury." Thompson v. Brennan (1899), 104 Wis. 568.

It appears from the above quotation that the Wisconsin Supreme Court also dissents from the New York rule. It holds that, in all cases of motions for directed verdicts, the question is and has always been, "not whether there was any evidence to support the verdict but whether there was any evidence to support a contrary verdict." And the same doctrine was reaffirmed in Nat. Cash Register Co. v. Bonneville (1903), 119 Wis. 222, where the court somewhat tartly requests counsel to cease quoting New York cases on this point. Iowa also holds against the New York rule, and in German Savings Bank v. Bates Imp. Co. (1900), 111 Iowa, 435, the court condemned a contrary dictum in Bank v. Milling Co., 103 Iowa, 524, and squarely took the same position which is indorsed by the courts of Wisconsin and Minnesota.—*Michigan Law Review.*

JUDGE PARKER'S SEVERE ARRAIGNMENT OF THE LEGAL PROFESSION.

Judge Parker, late Democratic candidate for president, gave out a set of rules to govern the conduct of lawyers when he addressed the Illinois Bar Association a few days ago.

The rules are interesting. They show how far practice can depart from precept in the law. Here is what Judge Parker said:

"In closing, I would emphasize anew the thought that, as the lawyer finds himself the beneficiary and the heir of great privileges which yield commanding opportunities, it is more incumbent upon him than upon any other to recognize that these privileges and powers impose obligations from which there can be no escape, as indeed, there ought not to be, except by meeting and welcoming them in the completest sense possible. If at any time it shall become apparent that the sanctity of the ballot is either threatened or assailed; if the administration of the law, whether civil or criminal, becomes either lax or careless; if the evils in any industrial movement manifest such power that they threaten monopoly or put popular rights in peril; if the executive, the legislative or the judicial branches of our system shall, either by design or accident, tend to trench unduly or dangerously upon the rights of any of the others—the one man who should resent and resist the dangers thus threatened is the American lawyer. The traditions of his profession, the execution of high trust confided to him, the example set him by great leaders through many generations, al demand that he should exercise the greatest watchfulness and show the highest courage."

Not many months ago a steal known as the Remsen Gas bill was boodled through the New York legislature. The New York Gas Trust under this bill was made master of that city. Mayor McClellan, under the lash of Boss Murphy, signed the bill. Then the newspapers took up the fight for the people. In this critical time Elihu Root, great lawyer and big citizen, wrote a brief for the gas people, in which he attempted to show that the bill was a fine thing for the gas consumer. Governor Odell, a Republican, finally killed the bill which a Democratic mayor said was perfect and which Root, the lawyer, recommended to the public.

A few weeks ago the legislature resolved to investigate the gas situation in New York City. A committee went down. One lawyer after another was sought, and all refused for a fee to assist the committee. They were attorneys for Standard Oil or its hundreds of subsidiary corporations, or hoped to be. One lawyer told the chairman if he took the people's side he need never look for business from the public service corporations. Finally one lawyer was found, and he was a match for the dozen lawyers who confronted him for the Gas Trust. He had right on his side. You read how the chairman of the people's forces in Philadelphia had to leave that city and go to New York for a lawyer. The big lawyers of Philadelphia were in the service of the Philadelphia lighting trust or some corporation having similar interests. And the lawyer has ceased to be a lawyer alone. Time was when a lawyer only advised clients and never appeared before the public except as an advocate before a court. For a lawyer to address a city council or council committee in support of seekers for franchises was considered unprofessional. For a lawyer to seek to influence a legislative committee was regarded as equally wrong.

In England to-day such men are not called lawyers. Their status is fixed. They are recognized as lobbyists. Here the man is both lawyer and lobbyist.

In Chicago there are lawyers who get business because they can enter the back door of a judge's chamber. Such lawyers are hired to do unlawful business because they have, or claim to have, a "pull" with the courts. Some sharp lawyers now practice through the newspapers of a certain class. They advise how to work a council, how to drive a mayor into a corner, and in the business of promoting a franchise grab they bring pressure to bear from all sources. They ascertain the cost of bribing a measure through and tell how and on whom the money shall be spent. One member of these law huckstering firms runs with the democratic crowd and the other with the republicans. One man works with the churches, another trains with the short-haired boys. Such lawyers have become the commission merchants in a profession which they have commercialized. They will profess great devotion to Dunne, or any other public officer trying to do his

duty, and then turn their newspaper allies loose at him.

No great trust was ever formed to beat the law whose chief contriver was not a lawyer. No get-rich-quick scheme was ever brought into being without its plan being submitted to a lawyer whose business it is to make it capable of breaking the law without the application of the penalty. A fraudulent assignment is always drawn by a lawyer. There are honest lawyers—a few—but they do not get rich fast, and reputation these days is only valued in visible property assets.

The law is the only calling in which its members can for a fee defend a wrong act or assist in the doing of a wrong act without sharing the odium of the wrong-doer. And from the ranks of those lawyers who have reduced a noble profession to a business for quick money making an occasional judge is selected. You have had this kind in Chicago. And when they become judges they do not cease being special advocates. This class of judges, however, it must be said, has been somewhat reduced in Chicago. Their records were exposed and the people beat them at the ballot box. In spite of citations for contempt, the truth was printed, and the people did the rest.

The lawyers have a great work before them, but the honest ones seem to be timid and no one has yet asked for a conference for separating the practice of graft from the practice of law. And Chicago needs such a conference. In all the graft that this city has suffered the lawyer has done more than his share of the work.

The law in Chicago will gain its deserved power when lawyers are made to cease debauching it.—*Chicago Examiner.*

CORRESPONDENCE.

"MEASURE OF DAMAGES IN AN ACTION BASED ON FRAUDULENT REPRESENTATIONS."—A COMPARISON OF THE CASES OF WALKER & CO. V. WALBRIDGE, 136 FED. REP. 19, AND SMITH V. BOLLES, 132 U. S. 125, 10 SUP. CT. REP. 39.

To the Editor of the Central Law Journal:

To state differently from that given in JOURNAL No. 22, Vol. 60, p. 421-2, the true difference between the above cases, it may be said to be that in the latter case the complaint went to the whole subject-matter of the contract, while in the former case the complaint goes o paying a portion of $20,000 for 11 sections of land that defendant failed to give, the 32 sections that plaintiff received being entirely out of the case, the court having nothing to do with what he actually acquired under the contract. The case of Walker & Co. v. Walbridge seems analogous to breach of warranty and quiet enjoyment as to part of land purchased. See the leading case of Morris v. Phelps, 5 Johns. (N. Y.) 49-56; also, 25 Ill. 234. The dissenting opinion in the first case in heading seems to be an attempt to drag in that part of the contract as to which plaintiff makes no complaint, the 32 sections. Of course, by alleging the agreed price for the whole tract, 43 sections, the plaintiff is estopped from asking repayment of the actual value at the time of contract of the 11 sections in excess of the proper proportion of the $20,000; but, subject to this, it seems that he has a right to the proportionate value—not, however, based on proportionate acreage—of the tract he did not get. Is not defendant bound by the $20,000 for the 43 sections?

HERBERT J. ADAMS,
Davenport, Iowa. Attorney at Law.

HUMOR OF THE LAW.

The late Judge John P. Rea, at one time national commander of the G. A. R., was one of the judges of the district court of Minnesota, and was presiding at the trial of an important case in Minneapolis, in which the late Judge Shaw was counsel for one of the litigants. Judge Shaw had been a judge of the same court several years before.

Judge Shaw was arguing a question of law and read authority after authority, commenting at great length upon each one, when Judge Rea stopped him, saying: "Judge, the law you are reading and arguing is undoubtedly good law, in fact it is elemental, and it seems to me you might assume that the court knows elementary law."

"Well," says Judge Shaw, "I was a judge of this court once myself and my experience while on the bench taught me that it was not safe for a lawyer in the forum to assume that a court knows anything."

A complaint before an Indiana justice charges "that the Defendant Who is Engaged in the Fortune telling Business induced this plaintiff to enter into A contract with the Defendant for the purpose of Keeping this Plaintiffs Wife from Eloping with A Man and deserting this plaintiff and promised to keep said wife at home and with this plaintiff for the sum of $10, Dollars," and that "Defendant Tuck adVantege of his trubels and conditions and knowingly defrauded this Plaintiff.

The cross-examiner had kept the witness on the stand for some time, and the witness naturally was getting weary.

"If you would only answer my questions properly," said the cross-examiner, "we would have no trouble. If I could only get you to understand that all I want to know is what you know, we—"

"It would take you a lifetime to acquire that," interrupted the witness.

"What I mean is that I merely want to learn what you know about this affair," the lawyer said, frowning. "I don't care anything about your abstract knowledge of law or your information in regard to theosophy, but what you know about this case."

"Oh, that isn't what you want," said the witness in an offhand way. "I've been trying to give you that for some time, and—"

Tha lawyer got in an objection and the witness had to stop.

"If I don't want to know what you know about this particular case and nothing else," inquired the lawyer later, "what do you think I want to know?"

That seemed so easy that the witness laughed as he said:

"It isn't what I know that you want to know; it's what you think I know that you're after, and you're trying to make me know it or prove me a liar."

Then it was that every one in the court room knew that he had been on the witness stand before.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Death of Defendant in Action for Trespass.—On death of defendant in action for trespass, it may be continued against the heir, after more than one year, by service of supplemental complaint without summons, under Code Civ. Proc. 1902, § 142.—Sims v. Davis, S. Car., 49 S. E. Rep. 872.

2. ACCORD AND SATISFACTION—Acceptance of Check.—Acceptance of check, accompanying statement marked "to check in full," held not an accord and satisfaction.—Laroe v. Sugar Loaf Dairy Co., N. Y., 73 N. E Rep. 61.

3. ACTION—Answer as Waiving Objection to Premature Action.—Where, in assumpsit, the affidavit of defense denied the contract sued on, and the case was tried on the issue, it was too late to contend that the action was premature.—Welch v. Miller, Pa., 59 Atl. Rep. 1065.

4. ADVERSE POSSESSION—Railroad Right of Way.—Title to right of way granted by Congress to Northern Pacific Railroad Company cannot be acquired by adverse possession for private use under state statute of limitations, unless land adversely held would have been confirmed to the holder by Act April 28, 1904, ch. 1782 (33 Stat. 538).—Northern Pac. Ry. Co. v. Ely, U. S. S. C., 25 Sup. Ct. Rep. 302.

5. ALTERATION OF INSTRUMENTS—Date of Deed.—Plaintiff, claiming an alteration in the date of probate of a deed of land, was only bound to establish it by a preponderance of the evidence.—Gaskins v. Allen, N. Car., 49 S. E. Rep. 919.

6. ANIMALS—Liability of Keeper.—A person not the owner of a dog held not liable as its keeper, under Rev. St. ch. 4, § 52, because the dog is kept by its owner on his premises with his knowledge and permission.—McCosker v. Weatherbee, Me., 59 Atl. Rep. 1019.

7. APPEAL AND ERROR—Assignments of Error.—Although a demurrer to a complaint is joint and several, separate assignments of error to the overruling of the same held not to present the sufficiency of the complaint for review.—Whitesell v. Strickler, Ind., 73 N. E. Rep. 153.

8. APPEAL AND ERROR—Instructions.—A party has no right to complain that the court gave one of his written charges, because it did not thoroughly harmonize with the court's oral charge.—Birmingham Belt R. Co. v. Gerganous, Ala., 37 So. Rep 929.

9. APPEAL AND ERROR—Joint Exceptions Severally Assigned.—Defendants having jointly excepted to the court's finding and conclusions of law, they were not entitled to severally assign errors thereto.—Coy v. Druckamiller, Ind., 73 N. E. Rep. 195.

10. APPEAL AND ERROR—Jurisdictional Amount in Supreme Court.—Where a judgment on a *scire facias* on a recognizance of bail for the state was set aside, and the principal and interest exceeded $100, the supreme court had jurisdiction of a writ of error.—State v. Boner, W. Va., 49 S. E. Rep. 944.

11. APPEAL AND ERROR—Law of Case.—The principle of law of the case is limited to decisions of the prior appeal on points necessary to a determination of the cause.—City of Rushville v. Rushville Natural Gas Co., Ind., 73 N. E. Rep. 87.

12. APPEAL AND ERROR—Questions for Review.—Where a question is neither raised on the trial of the case, nor argued on motion for new trial, nor assigned as error in the appellate court, it is waived so far as the supreme court is concerned.—Dunn v. Crichfield, Ill., 73 N. E. Rep. 386.

13. APPEAL AND ERROR—Reviewing Evidence.—Court of appeals will determine whether evidence warranted submission to the jury, where it does not appear that affirmance by Appellate Division was unanimous.—Perez v. Sandrowitz, N. Y., 73 N. E. Rep. 228.

14. APPEAL AND ERROR—Special Verdict.—The jury having found in favor of defendants jointly in a suit on a note, the overruling of a demurrer to a separate defense filed by one defendant, if error, was harmless.—Steeley v. Seward, Ind., 73 N. E. Rep. 139.

15. APPEARANCE—Equivalent to Service of Process.—A voluntary appearance is equivalent to a service of process, and confers jurisdiction of the person.—Giboney v. Cooper & Cooper, W. Va., 49 S. E. Rep. 939.

16. ARBITRATION AND AWARD—Misconduct of Arbitrators.—An award under a submission in a policy cannot be impeached by evidence of misconduct of the arbitrators.—Billmyer v. Hamburg-Bremen Fire Ins. Co. W. Va., 49 S. E. Rep. 901.

17. ASSAULT AND BATTERY—Removing Attached Goods.—Acting under advice held not to relieve one from criminal liability for assault and battery.—Commonwealth v. Middleby, Mass., 73 N. E. Rep. 208.

18. ATTACHMENT—Ground of Attachment.—Where the ground of attachment is fraudulently contracting debts, if the material facts are stated in an uncertain manner, the attachment should be quashed.—Elkins Nat. Bank v. Simmons, W. Va., 49 S. E. Rep. 893.

19. ATTACHMENT—Removal of Attached Property.—A sheriff attaching goods in a store held not bound to remove them before making a schedule thereof.—Commonwealth v. Middleby, Mass., 73 N. E. Rep. 208.

20. ATTORNEY AND CLIENT—Bill to Recover Surplus Moneys on Foreclosure.—On a bill by a mortgagor to recover surplus moneys on foreclosure, an agreement that her attorney should receive a certain per cent. of the amount recovered as compensation held not to affect the equity of the bill.—Johnston v. Reilly, N. J., 59 Atl. Rep. 1044.

21. ATTORNEY AND CLIENT—Disbarment Proceedings.—In proceedings for disbarment, evidence held to support charges of false representations to clients, and to warrant striking of respondent's name from roll of attorneys.—People v. Shirley, Ill., 73 N. E. Rep. 203.

22. BRIDGES—Injury to Pedestrian.—Whether the act of one in stepping on a defective bridge in a highway while looking to one side was the proximate cause of injury to her held a question for the jury.—Brewster v. Elizabeth City, N. Car., 49 S. E. Rep. 885.

23. BROKERS—Acting for Both Parties.—A real estate agent, acting for both parties without the knowledge of the owner, held not entitled to a commission from the owner.—Bunn v. Keach, Ill., 73 N. E. Rep. 419.

24. BURGLARY—Recent Possession of Stolen Property.—Recent possession of stolen property held to sustain a conviction of burglary, in the absence of other evidence creating a reasonable doubt of guilt.—Flanagan v. People, Ill., 73 N. E. Rep. 347.

25. CARRIERS—Car Service Association,—Rule of a car service association, withdrawing service on private sidings if charges are not promptly settled, held legal and enforceable.—Yazoo & M. V. R. Co. v. Searles, Miss., 37 So. Rep 939.

26. CARRIERS—Damages for Delay in Shipping Ice.—Where a carrier had no notice that plaintiff intended to use ice shipped for the packing of fish, it was not liable for loss of the fish caused by failure to deliver the ice.—Lewark v. Norfolk & S. R. Co., N. Car., 49 S. E. Rep. 852.

27. CARRIERS—Limited Liability Contract.—In an action against a carrier for damages to property trans-

ported, the shipper cannot set up a special contract and recover on an implied one, nor rely on a parol agreement and recover on a written contract.—Evansville & T. H. R. Co. v. McKinney, Ind., 73 N. E. Rep. 148.

28. CARRIERS—Regulation of Interstate Commerce.—Though a carrier by express is not organized as a corporation, it is subject to legislative control and regulation.—United States Express Co. v. State, Ind., 73 N. E. Rep. 101.

29. CHATTEL MORTGAGES—Advancements for Crops.—A mortgage on a crop for fertilizer construed, and held not to include crops raised by one of the parties individually, on which no part of the fertilizer was used.—Ferguson v. Twisdale, N. Car., 49 S. E. Rep. 914.

30. COMMERCE—Requiring Express Companies to Deliver Parcels.—Burns' Ann. St. 1901, § 3312a, requiring express companies to deliver parcels to the consignees in cities having a specified population, is not invalid as an attempt to regulate interstate commerce.—United States Express Co. v. State, Ind., 73 N. E. Rep. 101.

31. CONSTITUTIONAL LAW—Freedom to Contract.—Freedom to contract, protected by Const. U. S. Amend. 14, held not unduly abridged by Kansas anti-trust law of March 8, 1897, relating to combination of grain buyers.—Smiley v. State of Kansas, U. S. S. C., 25 Sup. Ct. Rep. 289.

32. CONSTITUTIONAL LAW—Monopolies.—The state, in the exercise of its reserved police power, may prescribe the limits within which corporations may contract.—Yazoo & M. V. R. Co. v. Searles, Miss., 37 So. Rep. 939.

33. CONSTITUTIONAL LAW—Municipal Franchises.—Ordinance granting franchise to gas company held a contract, which the municipality could not impair by subsequently attempting to fix maximum gas charges.—City of Rushville v. Rushville Natural Gas Co., Ind., 73 N. E. Rep. 87.

34. CONSTITUTIONAL LAW—Official's Surety Bonds.—Act April 20, 1904 (97 Ohio Laws, p. 182), providing that surety bonds shall be signed by surety companies only, is in violation of Const., art. 1, § 2, declaring that government is instituted for the equal protection and benefit of the people.—State v. Robins, Ohio, 73 N. E Rep. 470.

35. CONSTITUTIONAL LAW—Procedure and Pleading.—While the legislature may prescribe rules of procedure and pleading, yet it cannot encroach on the judicial domain and prescribe the mode in which the courts shall act.—Parkinson v. Thompson, Ind., 73 N. E. Rep. 109.

36. CONSTITUTIONAL LAW—Requiring Express Companies to Deliver Parcels.—Burns' Ann. St. 1901, § 3312a, requiring express companies to deliver parcels to the consignee in cities having a specified population, is not a deprivation of liberty or property without due process of law, within the inhibition of Const. U. S. Amend. 14.—United States Express Co. v. State, Ind., 73 N. E. Rep. 101.

37. CONSTITUTIONAL LAW—Right to Fix the Number of Corporation Directors.—Burns' Ann. St. 1901, § 5051, held not to limit the right of the stockholders of a corporation to fix by by-law the number of directors after the first year.—Renn v. United States Cement Co., Ind., 73 N. E. Rep. 269.

38. CONSTITUTIONAL LAW—Right of Majority to Amend Corporation By-laws.—The minority stockholders of a corporation have no right, vested or otherwise, which is infringed by the majority amending the corporate by-laws in the manner provided therefor.—Renn v. United States Cement Co., Ind., 73 N. E. Rep. 269.

39. CONSTITUTIONAL LAW—Salaries of County Surveyors.—Act April 25, 1904 (97 Ohio Laws, pp. 313, 314), entitled "An act fixing the salaries of county surveyors in various counties," is repugnant to Const., art. 2, § 20, because the power conferred by the act on the judges of the court of common pleas is a legislative power.—State v. Rogers, Ohio, 73 N. E. Rep. 461.

40. CONSTITUTIONAL LAW—Statutes Authorizing Destruction of Fish Nets in Public Waters.—Rev. St. § 6968-2, as amended April 20, 1898 (93 Ohio Laws, p. 303), authorizing destruction of any fish nets in the waters of the state in violation of law, and declaring such nets a public nuisance, held not unconstitutional as depriving the citizen of his property without due process of law.—State v. French, Ohio, 73 N. E. Rep. 216.

41. CONSTITUTIONAL LAW—Taxation of Nonresident Stockholder.—Due process of law held not denied a nonresident stockholder in a domestic corporation by imposition, under Code Pub. Gen. Laws Md., art. 81, of personal liability for taxes on his stock.—Corry v. City of Baltimore, U. S. S. C., 25 Sup. Ct. Rep. 297.

42. CONTRACTS—Marriage Agreement Construed.—The phrase "to wit," in a contract between husband and wife, referring to the date of their wedding, has not the materiality of that phrase when used in a pleading.—Sawyer v. Churchill, Vt., 59 Atl. Rep. 1014.

43. CONTRACTS—Restraint of Trade.—Agreement by owner of coal lands to sell the same and not engage in mining in a certain district for 10 years held not contrary to public policy.—Monongahela River Consol. Coal & Coke Co. v. Jutte, Pa., 59 Atl. Rep. 1088.

44. CONTRACTS—Restraint of Trade.—Contract restricting sale of printing presses by the manufacturer to any other than the other party to the contract held not void as in restraint of trade.—New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., N. Y., 73 N. E. Rep. 48.

45. CORPORATIONS—Director's Knowledge of Equities in Assigned Mortgage.—A corporation, taking an assignment of a mortgage, is not bound by the knowledge of its director, who procured the assignment, that a prior assignment of the mortgage had been fraudulently obtained.—Gilkeson v. Thompson, Pa., 59 Atl. Rep. 1114.

46. COUNTIES—Invalid Levy of Road and Bridge Tax.—A levy of taxes under a resolution of the board of supervisors ordering a certain amount to be levied as a county tax "for county taxes" for the current year is invalid.—Cincinnati, I. & W. Ry. Co. v. People, Ill., 73 N. E. Rep. 810.

47. COUNTIES—Jurisdiction Over Nonresident Citizen's Property.—Absence of a citizen from the state, in which he leaves property, does not prevent the courts of the state having jurisdiction of the property from asserting that jurisdiction in the method prescribed by statute.—Hollenback v. Poston, Ind., 73 N. E. Rep. 162.

48. COURTS—Legislative Curtailment of Jurisdiction.—Loc. Acts 1898-99, p. 176, held, in so far as it deprives the circuit court of a certain county of a grand jury except in certain cases, and of jurisdiction to try indictments, violative of Const. 1901, § 143.—Adcock v. State, Ala., 37 So. Rep. 919.

49. COURTS—Waiver of Objections to Remedies.—While parties cannot by consent confer jurisdiction upon a court which has none, they may, either expressly or by their conduct, waive objections to remedies pursued in courts having jurisdiction of the subject matter.—Foster v. Phinizy, Ga., 49 S. E. Rep. 865.

50. CRIMINAL EVIDENCE—Testimony Given at Preliminary Hearing.—An official reporter for the circuit court may testify in rebuttal as to evidence given at a preliminary hearing before a committing magistrate.—Snelling v. State, Fla., 37 So. Rep. 917.

51. CRIMINAL LAW—Issues Joined on What Plea.—An affirmative showing in judgment entry that issue was joined on plea of not guilty held to exclude any assumption that issue was joined on plea in abatement.—Jackson v. State, Ala., 37 So. Rep. 920.

52. CRIMINAL LAW—Prosecution by Information.—Any error in holding certain counts of an information sufficient is harmless, where accused is acquitted on those counts.—Knox v. State, Ind., 73 N. E. Rep. 255.

53. CRIMINAL TRIAL—Improper Remark of Counsel.—It was not error to refuse a mistrial because of an improper remark of the solicitor general; he having withdrawn it, and the court having instructed the jury to disregard it.—Goodman v. State, Ga. 49 S. E. Rep. 922.

54. CRIMINAL TRIAL—Service of Summons.—A prosecuting attorney may waive service of summons in error and enter appearance of the state.—Nichols v. State, Ohio, 73 N. E. Rep. 220.

55. CRIMINAL TRIAL—Showing Previous Difficulty in Homicide Case.—In homicide, where the state showed that there had been a previous difficulty, it was error to exclude testimony on defendant's behalf showing the details of such difficulty.—Brown v. State, Miss., 37 So. Rep. 957.

56. DEATH—Limitations on Action for.—The provision in Lord Campbell's Act of North Carolina (Code N. C. § 1498) that a failure to commence an action of wrongful death in one year should extinguish the right conferred by the statute applies to an action under the act brought in South Carolina.—Dennis v. Atlantic Coast Line R. R., S. Car., 49 S. E. Rep. 869.

57. DEATH—Master's Liability for Negligence of Driver.—In an action for the death of plaintiff's decedent by being run over by a team driven by defendant's servant, evidence held insufficient to support a verdict for the plaintiff.—Brennan v. Standard Oil Co., Mass., 73 N. E. Rep. 472.

58. DEATH—Parties to Action for Wrongful Death.—Where an action for wrongful death should be brought by the widow alone, and a nonsuit is entered in a suit by the widow and children, an appeal by the children separately in their own names will be quashed.—Haughey v. Pittsburg Rys. Co., Pa., 59 Atl. Rep. 1112.

59. DEDICATION—Acceptance of Street.—A city, by using for ten years a portion of land dedicated for a street, held not deprived of the right to use all of it for a street when necessary.—Indianola Light, Ice & Coal Co. v. Montgomery, Miss., 37 So. Rep. 958.

60. DEEDS—Delivery.—Delivery of a deed by the grantor to a third person, not made with intent to part with the right to recall the deed, was insufficient to pass title.—Spacy v. Ritter, Ill., 73 N. E. Rep. 447.

61. DEEDS—Sufficiency of Delivery.—In case of a voluntary settlement, the law presumes much more in favor of the delivery of the deed whereby the settlement is created than it does in ordinary cases of deeds of bargain and sale.—Baker v. Atwell, Ill., 73 N. E. Rep. 351.

62. DIVORCE—Desertion.—Where a husband, without fault of the wife, leaves her and fails to support her, it is not incumbent on her to seek out the deserter and ask a reunion.—Coe v. Coe, N. J., 59 Atl. Rep. 1059.

63. EJECTMENT—Reimbursement for Improvements.—A grantee of certain land, with notice of a violation of a condition in the deed to his grantor, held not a *bona fide* purchaser, entitled to reimbursement for improvements on being ejected.—Van Tassell v. Wakefield, Ill., 73 N. E. Rep. 340.

64. ELECTRICITY—Permit to Excavate Street.—An ordinance requiring a permit in order to excavate streets in a town held applicable to an electric light company previously authorized to erect poles in the streets and highways.—Cook v. North Bergen Tp., N. J., 59 Atl. Rep. 1035.

65. EMINENT DOMAIN—Ordinance Affecting Private Water Company.—An ordinance fixing water rates, and requiring a private company to supply, without charge, water to charitable, religious, and educational institutions, constituted a taking and appropriation of the property of such company.—City of Chicago v. Rogers Park Water Co., Ill., 73 N. E. Rep. 375.

66. EQUITY—Adequate Remedy at Law.—Where property belonging to one is in the possession of another, who refuses to permit the owner to remove it, there is a remedy at law, and equity has no jurisdiction.—Yellow Pine Export Co. v. Sutherland-Innes Co., Ala., 37 So. Rep. 922.

67. ESTOPPEL—Right of Way.—A land owner, by a written agreement therefor and allowing a street railroad company to construct and operate a road over his land for several years, held to be estopped to question the right to continue such use.—Robertson Mortgage Co. v. Seattle R. & S. Ry. Co., Wash., 79 Pac. Rep. 610.

68. ESTOPPEL—Suit to Cancel Water Company's Contract.—The making of improvements by a water company after suit to cancel its contract with a city, held not to estop the city from prosecuting the proceedings.—Meridian Waterworks Co. v. City of Meridian, Miss., 37 So. Rep. 927.

69. EVIDENCE—Ambiguity in Contract for Sale of Land.—A contract for the sale of land held ambiguous as to whether it is a contract of sale by the acre, and parol evidence as to the circumstances when the contract was made is admissible in interpreting it.—Newman v. Kay, W. Va., 49 S. E. Rep. 926.

70. EVIDENCE—Opinion of Witness.—A non-expert witness may testify that after examination he thought a person was seriously hurt and knocked senseless.—Hyland v. Southern Bell Telephone & Telegraph Co., S. Car., 49 S. E. Rep. 879.

71. EVIDENCE—Testimony to Explain Written Contract.—Descriptive words in a contract conveying timber held sufficient to pass the property, but to require the aid of parol testimony to ascertain their true meaning.—Ward v. Gay, N. Car., 49 S. E. Rep. 884.

72. EVIDENCE—Value of Dog.—In an action for killing plaintiff's dog, it is error to admit evidence as to what plaintiff was offered for the dog two years before.—Southern Ry. Co. v. Parnell, Ala., 37 So. Rep. 925.

73. EVIDENCE—What Constitutes a Preponderance.—By a preponderance of the evidence is meant the greater weight of the evidence.—Nickey v. Steuder, Ind., 73 N. E. Rep 117.

74. EXECUTORS AND ADMINISTRATORS—Action by Administrator on Life Policy.—An action by an administrator to recover on a policy of insurance on the life of his decedent does not involve the exercise of probate jurisdiction, and an appeal from a judgment therein is therefore governed by the Civil Code.—Holderman v. Wood, Ind., 73 N. E. Rep. 199.

75. EXECUTORS AND ADMINISTRATORS—Personal Contract of Administrator.—Agreement of administrator with next of kin to procure his discharge held a personal promise, enforceable against him individually.—Thompson v. Thompson, N. Y., 73 N. E. Rep. 43.

76. FIRE INSURANCE—Proof of Loss.—In action on an insurance policy, held that, the preliminary proof of loss having been made another was unnecessary after an award as to the amount of loss.—Billmyer v. Hamburg-Bremen Fire Ins. Co., W. Va., 49 S. E. Rep. 901.

77. FRAUDS, STATUTE OF—Authority of Treasurer to Sell Real Estate.—Treasurer of real estate corporation held authorized to sell real estate of the corporation without written authority for that purpose.—Henry v. Black, Pa., 59 Atl. Rep. 1070.

78. FRAUDS, STATUTE OF—Contract Conveying Standing Timber.—Contract conveying standing timber is a contract concerning realty, which must be in writing and cannot be altered by parol.—Ward v. Gay, N. Car., 49 S. E. Rep 884.

79. FRAUDULENT CONVEYANCES—Preferences.—Independent of statutory regulations, such as bankruptcy or insolvency proceedings, near relatives may prefer one another in the payment of debts.—Commonwealth Bank v. Kearns, Md., 59 Atl. Rep. 1010.

80. FRAUDULENT CONVEYANCES—Want of Consideration.—A conveyance by husband to wife in fraud of creditors may be set aside, where no consideration was paid, whether the wife had knowledge of the fraud or not.—Borror v. Carrier, Ind., 73 N. E. Rep. 128.

81. GAMING—Wagering Contracts.—On an issue of wager in a contract for the sale of wheat, testimony as to the methods of the board of trade in the purchase and sale of wheat held admissible.—Farnum v. Whitman, Mass., 73 N. E. Rep. 473.

82. HIGHWAYS—Abandoned Railroad Right of Way.—Where a railroad company had notice of an application

to lay out a highway over its abandoned roadbed, and made no objection at the time, it could not attack the adjudication in a collateral proceeding.—Crescent Tp. v. Pittsburg & L. E. R. Co., Pa., 59 Atl. Rep. 1103.

83. HOMICIDE—Dying Declaration.—A dying declaration is improperly admitted, without specific proof that it was made by the declarant when resting under an abiding sense of impending dissolution.—Ashley v. State, Miss., 37 So. Rep. 960.

84. HOMICIDE—Inducing Another to Kill.—In a prosecution for murder in procuring another to commit his act, evidence of defendant's efforts in hiring some person to kill deceased and of his motive in doing so held admissible.—Johnson v. State, Miss., 37 So. Rep. 926.

85. HUSBAND AND WIFE—Antenuptial Agreement.—Antenuptial agreement grossly disproportionate to the value of the husband's estate will be presumed fraudulent as to the wife.—*In re* Warner's Estate, Pa., 59 Atl. Rep. 1113.

86. HUSBAND AND WIFE—Mortgage of Estate by Entirety.—A mortgage executed by husband and wife on real estate owned by them as tenants by the entireties to secure the debt of the husband is voidable as to the wife, as well as to the husband.—Neighbors v. Davis, Ind., 73 N. E. Rep. 151.

87. INDICTMENT AND INFORMATION—Different Counts.—Where the several counts in an information arose from one transaction, the state cannot be required to elect.—Knox v. State, Ind., 73 N. E. Rep. 255.

88. INFANTS—Deed Executed by Infant Wife.—A deed executed by a married woman while a minor was not ratified by lapse of time with no disaffirmance for more than 20 years.—Gaskins v. Allen, N. Car., 49 S. E. Rep. 919.

89. INFANTS—Tenants in Common.—Where, during the minority of a co-tenant another co tenant purchased at a mortgage sale, the infant co-tenant, after reaching majority, might waive his right to sue for his share in the claim purchased against the land.—Ryason v. Dunten, Ind., 73 N. E. Rep. 74.

90. INTEREST—Judicial Sales.—Where a sale has been made by a court commissioner, and notes taken for deferred payments, no demand for payment was necessary.—Blue v. Campbell, W. Va., 49 S. E. Rep. 909.

91. INTOXICATING LIQUORS—Liquor License Ordinance.—Invalidity of liquor license ordinance of 1903 held not to affect the right of the city to pass license ordinance in 1904, adding interest and attorney's fees to the license in case of delinquency.—City of New Iberia v. Moss Hotel Co., La., 37 So. Rep. 913.

92. INTOXICATING LIQUORS—Remonstrance to Application for License.—A proceeding to obtain a license to sell intoxicating liquors, under the statute, is in the nature of a civil action.—Bryan v. De Moss, Ind., 73 N. E. Rep. 156.

93. JUDGES—Change of Venue.—The fact that judge from whom change of venue was granted on ground of prejudice afterwards sat as a member of the appellate court, to which the case was taken, held not prejudicial error.—Biggins v. Lambert, Ill., 73 N. E. Rep. 371.

94. JUDGMENT—Action to Set Aside Marriage Annullment—Judgment of a foreign state denying petition of wife for maintenance, on ground that her marriage had been annulled in New York, held *res judicata*, in an action to set aside the decree of annullment.—Everett v. Everett, N. Y., 73 N. E. Rep. 231.

95. JUDGMENT—Essentials of a Plea Res Judicata.—A plea of *res judicata* that does not show that decision was on the merits, nor set forth the former pleading, so that that the court can say that it was on the merits, should be overruled.—Armstrong v. Manatee County, Fla., 37 So. Rep. 938.

96. LICENSES—Doing Business Without a License.—On a prosecution for selling pistol cartridges without a license, held error to give the general charge for the state.—Reid v. State, Ala., 37 So. Rep. 922.

97. LIENS—Waiver of Tender.—A person having a lien on goods for a sum fixed by contract, who demands a sum in excess of the contract price, waives the necessity of a tender and loses his lien.—Stephenson v. Lichtenstein, N. J., 59 Atl. Rep. 1033.

98. LIFE INSURANCE—Materiality of Representations in Application.—Statement, in application for a life insurance policy, that applicant had never had heart disease, held a material representation, which, if false, would avoid the policy.—Metropolitan Life Ins. Co. v. Moravec, Ill., 73 N. E. Rep. 415.

99. LIFE INSURANCE—Nonpayment of Premium.—A policy of life insurance held not forfeited for nonpayment of premiums, where the collector failed to call for the same as he agreed to do.—Rutherford v. Prudential Ins. Co., Ind., 73 N. E. Rep. 202.

100. LIMITATION OF ACTIONS—Usurious Interest.—Under Code, § 3836, relative to the recovery of usurious interest, the defense that the action was not brought within the statutory time held available, though not pleaded.—Tayloe v. Parker, N. Car., 49 S. E. Rep. 921.

101. MANDAMUS—Admission to Office.—Mandamus lies to compel the admission or restoration to office of the party having a clear *prima facie* right thereto.—Kline v. McKelvey, W. Va., 49 S. E. Rep. 896.

102. MANDAMUS—Contracts of Water Commissioners.—Mandamus will lie to compel a town to raise the money for the payment of a water plant constructed by the water commissioners under authority of Laws 1900, p. 1119, ch. 451.—Holroyd v. Town of Indian Lake, N. Y., 73 N. E. Rep. 36.

103. MANDAMUS—Failure to Deny Allegation of Answer.—In mandamus to compel a railroad company to lower its tunnel under a river, failure of the replication to deny an allegation of the answer held not an admission that the tunnel was no obstruction to navigation.—West Chicago St. R. Co. v. People, Ill., 73 N. E. Rep. 393.

104. MARRIAGE—Action for Alienating Wife's Affection.—In an action for alienating the affections of plaintiff's wife, plaintiff is not excused, on presenting certificate of marriage, from producing evidence of identification of the parties.—Snowman v. Mason, Me., 59 Atl. Rep. 1019.

105. MASTER AND SERVANT—Conflicting Evidence as to Assumed Risk.—Where the evidence is conflicting as to whether plaintiff had previous notice of the dangerous location of a coal chute by the side of the track, which caused his injury, the refusal to direct a verdict for defendant is proper.—Mobile & O. R. Co. v. Vallowe, Ill., 73 N. E. Rep. 416.

106 MASTER AND SERVANT—Defective Machinery.—A servant, injured by the automatic starting of a machine, held to be entitled to recover, though he failed to use means to prevent the machine from starting.—Lynch v. M. Stevens & Sons Co., Mass., 73 N. E. Rep. 478.

107. MASTER AND SERVANT—Fellow Servants.—Servants engaged in repairing a belt held fellow servants, for whose negligence the master was not liable, though one of them had general control as foreman.—Standard Pottery Co. v. Moudy, Ind., 73 N. E. Rep. 188.

108. MASTER AND SERVANT—Injury While Acting Under Foreman's Orders.—The fact that an employee had been warned against danger while shoveling ore at the foot of a pile of ore held not to preclude a recovery for injuries sustained while moving a barrow on a track pursuant to the foreman's order.—Illinois Steel Co. v. Olste, Ill., 73 N. E. Rep. 422.

109. MASTER AND SERVANT—Negligence of Telephone Company.—A telephone company which permits its wire to become broken and lie across a highly charged electric light wire, is guilty of want of ordinary care.—Central Union Telephone Co. v. Sokola, Ind., 73 N. E. Rep. 143.

110. MASTER AND SERVANT—Pleadings in Personal Injury Case.—Where a plaintiff does not base his right to recover on the negligence of a coemployee, nor aver that defendant knew of such negligence and he was ignorant thereof, an instruction in reference thereto is

erroneous, as not within the issues.—Nickey v. Dougan, Ind., 73 N. E. Rep. 288.

111. MASTER AND SERVANT—Safe Appliances.—The duty of a master to furnish proper appliances embraces human instrumentalities.—Hyland v. Southern Bell Telephone & Telegraph Co., S. Car., 49 S. E. Rep. 879.

112. MASTER AND SERVANT Sufficiency of Complaint in Action for Death.—In action against a master for the death of an employee, the complaint need not allege that a certain act or line of conduct was a duty imposed on the defendant by law.—Chicago, I. & L. Ry. Co. v. Barnes, Ind., 73 N. E. Rep. 91.

113. MASTER AND SERVANT—Transitory Perils.—The fact that a place is rendered unsafe in the execution of details of the service does not of itself make it the duty of the master to be present in person or by representative to protect the servant.—Dill v. Marmon, Ind., 73 N. E. Rep. 67.

114. MECHANIC'S LIENS—From What Time Effective.—A mechanic's lien held to take effect from the time the material was furnished, and to have priority over all subsequent liens, except the liens of other mechanics.—Krotz v. A. R. Beck Lumber Co , Ind., 73 N. E. Rep. 273.

115. MINES AND MINERALS—Duty to Operate Oil and Gas Lease.—A grant of all the oil and gas under certain premises, with the right to operate the same, excepting to the grantor one-sixth part of the oil produced, held to imply an engagement by the lessee to develop the premises.—Venedocia Oil & Gas Co. v. Robinson, Ohio, 73 N. E. Rep. 222.

116. MORTGAGES—Fradulent Disposition of Surplus Moneys.—On foreclosure of a mortgage, the court should not permit the sheriff to accept the receipt of the purchaser for the surplus money without summoning all the parties.—Johnston v. Reilly, N. J., 59 Atl. Rep. 1044.

117. MORTGAGES—Subsequent Lienors.—Plaintiff held not entitled to the vacation of a release discharging a trust deed as against a *bona fide* holder of a subsequent trust deed.—Havighorst v. Bowen, Ill., 73 N. E. Rep. 402.

118. MUNICIPAL CORPORATIONS—Defective Sidewalks.—In an action for injuries caused by an obstructed sidewalk, testimony of a watchman employed by private persons held competent on the issue of constructive notice to the city of obstruction.—City of Ottawa v. Hayne, Ill., 73 N. E. Rep. 385.

119. MUNICIPAL CORPORATIONS—Defective Streets.—It cannot be said as matter of law that to allow a cellarway to extend into the street was a defect.—City of Boston v. Brooks, Mass., 73 N. E. Rep. 406.

120. MUNICIPAL CORPORATIONS—Defective Streets.—Rapid driving of a buggy or intoxication of the driver will not defeat the right to recover for injuries sustained by one riding with him, unless they proximately contributed to the injury.—Thuis v. City of Vincennes, Ind., 73 N. E. Rep. 141.

121. MUNICIPAL CORPORATIONS—Injunction to Restrain Collection of Invalid Assessment.—Where a municipal corporation acts *ultra vires* in levying a tax or assessment, and attempts to collect it, equity will enjoin its collection.—Cain v. City of Elkins, W. Va., 49 S. E. Rep. 898.

122. MUNICIPAL CORPORATIONS—Ultra Vires Contract.—The action of the officers and counsel of a municipality in contracting for the services of a special attorney, in volation of an ordinance, does not estop the city to deny its liability for services performed under the contract.—Hope v. City of Alton, Ill., 73 N. E. Rep. 406.

123. NEGLIGENCE—Defective Streets.—In order to show contributory negligence, both the commission of a negligent act and a connection of that act with the injury as the proximate cause thereof must concur.—Brewster v. Elizabeth City, N. Car., 49 S. E. Rep. 885.

124. NEGLIGENCE—Driving Over Child in Street.—In an action for the death of infant, plaintiff must show absence of contributory negligence on the part of the deceased or of those in charge of him.—Brennan v. tandard Oil Co., Mass., 73 N. E. Rep. 472.

125. NEGLIGENCE—Duty to Muffle Sound of Gasoline Engine.—One operating a gasoline engine near a highway need not adopt any particular method of muffling the sound of the exhaust.—Wolf v. Des Moines Elevator Co., Iowa, 102 N. W. Rep. 517.

126. NEGLIGENCE—Leading Bear Along Public Street.—It is not negligence *per se* to lead a bear along a public street for a lawful purpose.—Bostock-Ferari Amusement Co. v. Brocksmith, Ind., 73 N. E. Rep. 281.

127 NEGLIGENCE—Res Ipsa Loquitur.—The mere fact that lumber which defendant was unloading from a car fe l and injured plaintiff's intestate held not to raise a presumption of negligence on defendant's part.—Laforrest v. O'Driscoli, R. I., 59 Atl. Rep. 928.

128. NUISANCE—Slot Machines.—A cigar store where a slot machine is set up, being a gambling device, held a nuisance, under Rev. St. 1903, c. 22, § 1, and may be enjoined as such.—Lang v. Merwin, Me., 59 Atl. Rep. 1021.

129. NUISANCE—Temporary Character.—Nuisance resulting from defilement of atmosphere held temporary in character, for which damages subsequent to institution of suit could not be recovered.—N. K. Fairbank Co. v. Bahre, Ill., 73 N. E. Rep. 322.

130. OFFICERS—Mandamus to Establish Right to Office.—Where one claims rights as an officer, he must show that he is an officer *de jure*, and that he is an officer *de facto* is insufficient.—Moon v. City of Champaign, Ill., 73 N. E. Rep. 408.

131. PRINCIPAL AND AGENT—Agent's Authority to Purchase Goods.—Authority of agent to purchase goods as agent for another cannot be implied from authority to sell goods and devote the purchase to a particular purpose.—Kelly v. Tracy & Avery Co., Ohio, 73 N. E. Rep. 455.

132. RAILROADS—Fire Communicated by Engine.—In an action for damages from fire communicated by defendant's engine, certain evidence held to cast the burden upon defendant of showing a proper handling of the engine.—Southern Ry. Co. v. Johnson, Ala., 37 So. Rep. 919.

133. RAILROADS—Injunction to Restrain Building of Viaduct.—Injunction will be granted to restrain performance of act, though plaintiff has adequate remedy at law, where defendant has a right to perform such act on compliance with certain conditions precedent.—Erie R. Co. v. City of Buffalo, N. Y., 73 N. E. Rep. 26.

134. RAILROADS—Mechanic's Lien.—One furnishing coal for a steam shovel used in the construction of a railroad is not entitled to a lien on the right of way and franchises, under Burns' Ann. St. 1901, § 7265.—Cincinnati, R. & M. R. Co. v. Shera, Ind., 73 N. E. Rep. 293.

135. RECEIVER—Capacity to Sue.—A complaint in an action by a receiver held to sufficiently allege, after verdict, that plaintiff had been authorized by the court to bring the action in his own name as receiver.—Minnich v. Swing, Ind., 73 N. E. Rep. 271.

136. REFORMATION OF INSTRUMENTS—Sufficiency of Complaint.—A bill for the reformation of a written instrument must show that there was a mutual mistake, the agreement actually made, and the agreement which the parties intended to make.—Johnson v. Sherwood, Ind., 73 N. E. Rep. 180.

137. SALES—Bought and Sold Notes.—The "bought" and "sold" notes given on a sale effected by a broker construed, and held, that there was no material variance, preventing them from showing a valid contract.—Eau Claire Canning Co. v. Western Brokerage Co., Ill., 73 N. E. Rep. 430.

138. SALES—Warranty of Suitableness.—Where a buyer orders a known and definite article, there is no warranty that it will answer the particular purpose for which he intends it.—American Home Sav. Bank Co. v. Guaranty Trust Co., Pa., 59 Atl. Rep. 1108.

139. SHERIFFS AND CONSTABLES—Action on Indemnity Bond.—A judgment against a sheriff for the conversion of property by attachment held admissible in an action on his indemnity bond.—Meyer v. Purcell, Ill., 73 N. E. Rep. 392.

140. SHERIFFS AND CONSTABLES—Failure to Execute Writ.—In an action against a sheriff for wrongful failure to execute a writ of *venditioni exponas*, evidence that he had a reasonable time to make the sale and failed to do so makes a *prima facie* case for plaintiff.—O'Bryan Bros. v. Webb, Ala., 37 So. Rep. 935.

141. SPECIFIC PERFORMANCE—Uncertainty of Letters Constituting Contract.—Certain letters alleged to constitute a contract for the sale of land considered and held not sufficiently clear as to the property to be conveyed to sustain a decree for specific performance.—Dreiske v. Joseph N. Eisendrath Co., Ill., 73 N. E. Rep. 879.

142. STATUTES—Constitutional Formalities.—It is within the power of either branch of the general assembly to suspend its rules and pass ordinary bills through their several readings on the same day.—Bray v. Williams, N. Car., 49 S. E. Rep. 887.

143. STATUTES—Constitutional Law.—An amendment to the general law applicable to the government of cities must be passed in strict compliance with requirements of the constitution.—Cahill v. Hogan, N. Y., 73 N. E Rep. 39

144. TAXATION—Assessing Back Taxes.—In a suit to enjoin the county treasurer from collecting taxes assessed by the county auditor on property which the taxpayer failed to list for taxation for previous years, the auditor's assessment will be presumed correct.—Parkison v. Thompson, Ind., 73 N. E. Rep. 109.

145. TAXATION—Board of Review.—A board of review in a subsequent year has no power to review and increase a personal tax assessment, on the theory that it was too low and that the board is engaged in assessing omitted credits.—Barkley v. Dale, Ill., 73 N. E Rep. 825.

146. TAXATION—Legacy to Non-Resident.—Legacy payable to non-resident legatee held, on his death, subject to transfer tax.—*In re* Clinch's Estate, N. Y., 73 N. E. Rep. 35.

147. TAXATION—Right to Have Objections Heard —The right of an objector to a tax to appear and have its objections heard cannot be challenged for the first time on appeal.—People v. Chicago & E. I. R. Co., Ill., 73 N. E. Rep. 315.

148. TENANCY IN COMMON—Constructive Trust.—A cotenant, who had purchased at a mortgage sale, held a constructive trustee for a co-tenant who seasonably elected to share in the benefit by paying his portion of the expense.—Ryason v. Dunten, Ind., 73 N. E. Rep. 74.

149. TRADE MARKS AND TRADE NAMES—Infringement. —Transfer of naked trade-mark confers no right of action for infringement.—Falk v. American West Indies Trading Co., N. Y., 73 N. E. Rep. 239.

150. TRIAL—Quotient Verdict.—Where a verdict is attacked as a quotient verdict, adverse party held entitled to prove by jurors themselves that method used was resorted to without agreement that result reached should be the verdict.—Birmingham Ry., Light & Power Co. v. Clemons, Ala., 37 So. Rep. 925.

151. TRIAL—Signature of Judge to Special Findings.— The signature of the trial judge to a special finding is required only for the identification of the paper, and may be dispensed with when the finding is brought into the record by a bill of exceptions or order of court.—Coffinberry v. McClellan, Ind., 73 N. E. Rep. 97.

152. TROVER AND CONVERSION—Authority to Make Demand.—Presumption of authority of person to make demand in conversion held not to arise because the person making demand sued for those by whose authority he purported to act.—Jesse French Piano & Organ Co. v. Johnston, Ala , 37 So. Rep. 924.

153. TRUSTS—Mingling of Funds.—The mere mingling of funds which are to be devoted to a specific trust purpose with other funds of the depositary does not destroy the right of the true owners of the trust fund to claim the specific funds.—Brown v Spohr, N. Y., 73 N. E. Rep. 14.

154. TRUSTS—Power of Sale.—The existence of liens on real estate, which a creditor desires to have sold under a deed of trust, is no impediment to the execution of the power of sale vested in the trustee.—George v. Zinn, W. Va., 49 S. E. Rep. 904.

155. TRUSTS—Recovery by Principal.—The fact that plaintiff, reposing confidence in defendant, gave him her money to loan and collect, did not render defendant trustee of a direct and continuing trust.—Hitchcock v. Cosper, Ind., 73 N. E. Rep. 264.

156. TRUSTS—Widow's Right to Succeed as Trustee.— The widow of a trustee is not entitled to be preferred in the appointment of a successor to administer the trust estate.—Whitehead v. Whitehead, Ala., 37 So. Rep. 929.

157. USURY—Recovery of Interest Paid.—Under Code § 3836, the question whether the payment of usury was suggested by the creditor or the debtor is immaterial.—Tayloe v. Parker, N. Car., 49 S. E. Rep. 921.

158. VENDOR AND PURCHASER—Parties to Bill to Enforce Lien.—Grantees of land in whom the legal title vested held proper parties defendant to a bill to enforce vendor's lien.—Acree v. Stone, Ala., 37 So. Rep. 934.

159. VENDOR AND PURCHASER—Sale of Land in Gross. —A vendor of land in gross cannot have rescission of the contract, on the ground of mutual mistake as to the quantity, where both parties were ignorant of the area of the land and free from fraud.—Newman v. Kay, W. Va., 49 S. E. Rep. 926.

160. VENDOR AND PURCHASER—Vendor's Lien. — A vendee in possession of land holds it charged with an equitable lien in favor of the vendor to secure the balance of the unpaid purchase price.—Borror v. Carrier, Ind., 73 N. E. Rep. 128.

161. WATERS AND WATER COURSES—Contract to Supply Municipal Corporation.—A contract requiring the party contracted with to furnish "pure and wholesome water" required the water to be furnished to be reasonably pure and wholesome.—Meridian Waterworks Co. v. City of Meridian, Miss., 37 So. Rep. 927.

162. WATERS AND WATER COURSES—Contract to Supply Town.—The existence of a subsisting contract to supply a town with water does not prevent the town council from making a contract for a further or other supply under P. L. 1898, p. 366.—Jersey City v. Town of Kearny, N. J., 59 Atl. Rep. 1056.

163. WATERS AND WATER COURSES—Ordinance Requiring Company to Furnish Free Water to Charities.—An ordinance fixing water rates, and requiring a private company to supply, without charge, water to charitable, religious and educational institutions, could not be justified as an exercise of the police power.—City of Chicago v. Rogers Park Water Co., Ill., 73 N. E. Rep. 875.

164. WILLS—Construction.—Words of survivorship in a will *prima facie* refer to the time of testator's death; but, if the time of payment be postponed in the will, the words of survivorship relate to postponed period.—Renner v. Williams, Ohio, 73 N. E. Rep. 221.

165. WILLS—Construction of Joint Will.—Joint will of husband and wife construed, and held not to suspend the disposition of property until the death of the surviving husband, and properly probated as the separate will of the wife.—Gerbrich v. Freitag, Ill., 73 N. E. Rep. 335.

166. WILLS—Ignorance of Law.—Ignorance of rule that party taking benefit of provision in a will is estopped to deny its invalidity will not prevent the application of such rule, in the absence of fraud or misrepresentation. —Utermehle v. Norment, U. S. C. C., 25 Sup. Ct. Rep. 291.

167. WILLS—Probate of Lost Will.—Under Const. art. 6, § 18, and the statute of wills, the county court has exclusive original jurisdiction of the probate of an alleged lost will.—Beatty v. Clegg, Ill., 73 N. E. Rep. 383.

168. WITNESSES—Transactions With Decedent.—Interested party held prohibited by Code Civ. Proc. § 829, from explaining transaction between decedent and a third party.—Burdick v. Burdick, N. Y., 73 N. E. Rep. 23.

INDEX-DIGEST

TO THE EDITORIALS, NOTES OF RECENT DECISIONS, LEADING ARTICLES, ANNOTATED CASES, LEGAL NEWS, CORRESPONDENCE AND BOOK REVIEWS IN VOLUME 60

A separate subject-index for the "Digest of Current Opinions" will be found on page 506, following this Index-Digest.

SUBJECT-INDEX

TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 60.

This subject-index contains a reference *under its appropriate head* to every digest of current opinions which has appeared in the volume. The references, of course, are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head, for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.